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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This is an appeal from the criminal conviction of the publisher of a newspaper arising out of its publication of a news article accurately reporting the fact that a particular judge had been the subject of an investigation and hearing by the Virginia Judicial Inquiry and Review Commission.* Appellant is Landmark Communications, Inc. ("Landmark"), the publisher of *The Virginian-Pilot*, a newspaper of general circulation in Tidewater, Virginia. The appeal is from the decision of the Virginia Supreme Court entered on March 4, 1977 affirming, by a 6-1 vote, the conviction of Landmark and upholding the constitutionality of Va. Code § 2.1-37.13 as applied to Landmark. This Jurisdictional Statement is submitted to demonstrate that this Court has jurisdiction of this appeal and that substantial constitutional questions meriting review by the Court are presented.

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* The article is set forth in the Appendix at p. 31a.

Opinions Below

The opinion of the Virginia Supreme Court dated March 4, 1977 is set forth in the Appendix at p. 1a and is not yet reported. The order of the trial court dated January 15, 1976, finding Landmark guilty as charged and imposing a fine of $500 is set forth in the Appendix at p. 21a and is unreported.

Jurisdiction

On November 5, 1975, a grand jury in the Circuit Court of the City of Norfolk, Virginia returned a true bill indicting Landmark for having "unlawfully divulge[d]", in violation of Va. Code § 2.1-37.13, "the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing by the Judicial Inquiry and Review Commission." (JA 2)* Landmark moved to quash and dismiss the indictment alleging, *inter alia*, that Va. Code § 2.1-37.13 did not apply to Landmark's published article and that it could only be applied to Landmark in violation of the First Amendment to the United States Constitution. (JA 3) On December 10, 1975, the trial court overruled Landmark's motion to quash and dismiss the indictment (JA 64) and Landmark was tried before the court sitting without a jury. On January 15, 1976, the trial court found Landmark guilty as charged. (JA 65) On January 29, 1976, Landmark filed its Notice of Appeal and Assignments of Error alleging, *inter alia*, that Va. Code § 2.1-37.13 did not apply to Landmark's published article and that said section could only be applied to Landmark

*References to "JA—" are to the appropriate pages of the Joint Appendix filed with the Supreme Court of Virginia; references to "—a" are to the appropriate pages of the Appendix to this Jurisdictional Statement.

in violation of the First Amendment to the United States Constitution. (JA 69) On March 4, 1977, the Supreme Court of Virginia rendered its decision affirming Landmark's criminal conviction and rejecting its constitutional arguments. A Notice of Appeal was filed on April 15, 1977, a copy of which is set forth at p. 34a of the Appendix.

Jurisdiction of this Court to review the decision of the Supreme Court of Virginia is conferred by Title 28, U.S.C. Section 1257(2).

Questions Presented

(1) May a newspaper, consistently with the First and Fourteenth Amendments to the United States Constitution, be convicted and subjected to criminal sanctions for its publication of truthful statements concerning a public official in connection with his public duties?

(2) Assuming *arguendo* that a newspaper may ever be convicted and subjected to criminal sanctions for such conduct, may it, consistently with the First and Fourteenth Amendments to the United States Constitution, be convicted and subjected to criminal sanctions under Va. Code § 2.1-37.13 in the absence of factual proof adduced in evidence proving beyond a reasonable doubt that its publication of a truthful report concerning the investigation of a named judge by a state judicial commission constituted a clear and present danger to the administration of justice?

(3) Is Va. Code § 2.1-37.13, as interpreted by the Supreme Court of Virginia, unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution?

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Fourteenth Amendment of the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Article VI, § 10 of the Constitution of Virginia provides, in part:

> "The General Assembly shall create a Judicial Inquiry and Review Commission consisting of members of the judiciary, the bar, and the public and vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge. The Commission shall be authorized to conduct hearings and to subpoena witnesses and documents. Proceedings before the Commission shall be confidential.
>
> "If the Commission finds the charges to be well-founded, it may file a formal complaint before the Supreme Court.
>
> "Upon the filing of a complaint, the Supreme Court shall conduct a hearing in open court and, upon a finding of disability which is or is likely to be permanent and which seriously interferes with the performance by the judge of his duties, shall retire the judge from office. A judge retired under this authority shall be considered for the purpose of retirement benefits to have retired voluntarily.
>
> "If the Supreme Court after the hearing on the complaint finds that the judge has engaged in misconduct while in office, or that he has persistently failed to perform the duties of his office, or that he has engaged in conduct prejudicial to the proper administration of justice, it shall censure him or shall remove him from office."

Sections 2.1-37.1 through 2.1-37.18 of the Code of Virginia provide for the establishment, nature and rules relating to the Virginia Judicial Inquiry and Review Commission.* Section 2.1-37.13 provides, in relevant part, as follows:

> "All papers filed with and proceedings before the Commission, and under the two preceding sections (§§2.1-37.11 ["Order compelling witness to attend and testify"], 2.1-37.12 ["Depositions"]), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character. . . .
>
> "All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal, shall be kept in the confidential files of the Commission.
>
> "Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."

The term "divulge" is not defined in the Virginia Code.

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* The complete text of the Virginia statutes relating to the Commission is set forth as Appendix C to this Jurisdictional Statement at pages 22a-30a.

Pursuant to Va. Code § 18.2-11(a), a misdemeanor may be punished by imprisonment for up to 1 year and a fine of up to $1,000.

Statement of the Case

On October 4, 1975, *The Virginian-Pilot*, a newspaper published by Landmark, printed on the first page of its second section an article which accurately identified and reported on a judge who had been investigated by the Virginia Judicial Inquiry and Review Commission (the "Commission"). The article stated that "[n]o formal complaint has been filed by the commission" against the judge, "indicating either that the five-man panel found insufficient cause for action or that the case is still under review." (31a)

On November 5, 1975, Landmark was indicted by a Grand Jury of the Circuit Court of the City of Norfolk for the publication of the October 4 article. The Grand Jury charged that Landmark "did unlawfully divulge the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing" by the Commission. (JA 2)

Trial was had on December 10, 1975, after the denial by the trial court of Landmark's motion to quash and dismiss the indictment. (JA 64) The only evidence introduced by the Commonwealth (other than the charter, articles of amendment, and last annual report of Landmark) was a Stipulation of Evidence stating that Landmark was a Virginia corporation which publishes *The Virginian-Pilot*; that on October 4, 1975, Landmark published an article which identified a judge who had been investigated by the Commission; and that at the time of the publication of the article the Commission had not filed a formal complaint

concerning the judge with the Supreme Court of Virginia. (JA 6-7)

The only witness who testified at the trial was Mr. Joseph W. Dunn, Jr., Managing Editor of *The Virginian-Pilot*. He testified, on behalf of Landmark, that he made the decision to publish the article because (1) a complaint had been filed against the judge many months prior to the hearing before the Commission and (2) the news was of such importance that it should be brought to the attention of the public. (JA 55) Mr. Dunn stated that he was aware that it was a misdemeanor for individuals who participated in the proceedings before the Commission to reveal information concerning the proceedings, but that he had not understood the statute to apply to newspaper reports about proceedings before the Commission. (JA 55-56) He further testified that no reporter, employee or agent of Landmark had been subpoenaed before or otherwise participated in the proceedings before the Commission. (JA 56)

On January 15, 1976, the trial court found Landmark guilty as charged. Its Order did not deal with, or even refer to, the statutory and constitutional arguments made by Landmark. Instead, the Order simply concluded that "the Court doth find the defendant Guilty as charged", fixing punishment at $500 and requiring Landmark to pay the costs of prosecution. (JA 65-66)

The decision of the Supreme Court of Virginia affirming the conviction of Landmark by a 6-1 vote, characterized the case as involving "a confrontation between the First Amendment guaranty of freedom of the press" and § 2.1-37.13. (1a) After rejecting Landmark's contention that the statute did not cover it and holding that the statute "[c]learly" applied to Landmark, the Court dealt with the direct confrontation between the statute as so interpreted

and the First Amendment, acknowledging that the matter was "serious" and "important" and that it presented "an issue not decided previously by this Court or, so far as our research discloses, by any other appellate court in this country." (5a-6a)

Viewing the case as one involving "subsequent punishment" rather than prior restraint (8a)—a conclusion with which we do not quarrel on this appeal—the Court purported to apply a clear and present danger test in the following fashion: it conceded that Landmark could not be punished for "publishing the confidential information contained in the article" unless the revelation created "a clear and present danger to . . . the orderly administration of justice"; it held that the statute itself, one of 35 in the nation requiring confidentiality with respect to judicial inquiry commissions*, constituted an appropriate finding of such a danger; and it conceded that no evidence had been adduced at trial that publication of the October 4, 1975 news article in *The Virginian-Pilot* constituted a clear and present danger to the administration of justice. The "requirement of confidentiality in Commission proceedings," the Court held:

> "(1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by pro-

* The number was based on information set forth in the publication of the American Judicature Society entitled *Judicial Disability and Removal Commissions, Courts and Procedures* (1973). As of the writing of this Jurisdictional Statement, over 40 jurisdictions have adopted review procedures.

> hibiting disclosure of their identity prior to a determination that the complaint is meritorious." (18a)

Concluding that "sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings" (18a), the Court upheld the statute's constitutionality and affirmed the conviction.

Justice Poff dissented, concluding that the statute "should be construed not to apply to this defendant under these circumstances" and that "[c]onstrued otherwise, the statute offends the First Amendment." (19a)

On April 15, 1977, Landmark filed a Notice of Appeal to this Court.

THE QUESTIONS ARE SUBSTANTIAL

Introduction

The substantiality of the federal questions raised by this appeal may perhaps be demonstrated most simply by reference to the language of the opinion of the Supreme Court of Virginia itself. Later events in Virginia relating to the statute in question underscore still further the significance of the matters in dispute.

The opinion of the Virginia Supreme Court recognizes its signal importance, its potential precedential impact on the many other states which require confidentiality of proceedings before judicial inquiry commissions and the fact that the opinion is the first dealing with such a statute to face the "confrontation" between the statute and the First Amendment. The result reached by the opinion is to affirm a finding of criminal liability on the part of a publisher for truthfully printing news about public officials

with respect to their performance of their public duties, notwithstanding the prior holding of this Court in *Garrison* v. *Louisiana*, 379 U.S. 64 (1964). The opinion does so in the name of a "clear and present danger" to the administration of justice test, notwithstanding the fact that in the four cases this Court has thus far considered in which such a claim has been made, it has been rejected. *Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Wood* v. *Georgia*, 370 U.S. 375 (1962). On such a basis alone, we believe this appeal warrants this Court's consideration.

Moreover, only 8 days after the decision of the Virginia Supreme Court, the United States District Court for the Eastern District of Virginia, in an Order entered by Judge Robert R. Merhige Jr., issued a temporary injunction restraining prosecution of a Virginia television station under the same section of Virginia law as that involved here. *Nationwide Communications, Inc.* v. *Backus* (C.A. No. 77-0139-R) (March 15, 1977). That order (a copy of which is set forth at p. 33a of the Appendix) has since expired;* its issuance after argument on the constitutional merits of the case itself raises serious questions as to the correctness of the decision of the Virginia Supreme Court and suggests the desirability of review by this Court of the correctness of the ruling in this action.**

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* According to press reports, Richmond television station WXEX, which is owned by Nationwide Communications, Inc. and which had broadcast the name of a judge under investigation by the Judicial Inquiry and Review Commission, abandoned its action due to the pendency of this appeal. *Richmond Times-Dispatch*, March 25, 1977, p. B8.

** On March 31, 1977, Richmond Newspapers, Inc., the publisher of the *Richmond Times-Dispatch* and the *Richmond News Leader*, was charged by the Commonwealth with violating Va. Code § 2.1-37.13. A motion for a temporary restraining order against the prosecution was denied on April 5, 1977 by United States District Judge D. Dortch Warriner, who stated that although he believed the statute was unconstitutional, he could not find the statute "patently and flagrantly unconstitutional" in light of the decision of the Supreme Court of Virginia. *Norfolk Ledger-Star*, April 6, 1977, p. A8.

I. *The Improper Imposition of Criminal Sanctions for the Publication of Truthful Statements About a Public Official Concerning Public Duties*

This case raises anew a question which penetrates to the core of our concept of self-government. It is nothing less than whether the press may be punished for printing the truth about a public official in connection with his public duties.

It is an old question—dating back to the Zenger trial itself—and it is one we believe this Court has long since answered. In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), this Court unanimously struck down a conviction under a Louisiana criminal libel law resulting from intemperate criticism of the judiciary. The Court's opinion emphasized that:

> "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' *New York Times Co.* v. *Sullivan*, 376 U.S., at 270." (379 U.S. at 74-75).

Recognizing the fundamental values at stake, the Court set forth with precision the precept which we believe governs here:

"Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." • (379 U.S. at 74)

This proposition has been reaffirmed recently in a very different context, one which—if anything—has historically been accorded far less First Amendment protection. In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court noted, in the context of speech concerned largely with commercial matters, rather than purely governmental affairs, that the state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." (*Id.* at 773.)••

Yet that is precisely what Va. Code § 2.1-37.13, as authoritatively interpreted by the Virginia Supreme Court, seeks to do. Pursuant to the decision, journalists or publishers could be fined or imprisoned if they ever printed the fact that an unfit judge who had been accused before the Commission was still sitting, or that an unfit—or corrupt—Commission had covered up for the judge. And, as in this case, the mere accurate reference in a news article

• More recent decisions concluding that civil libel laws may not be used by a public official or public figure to recover damages arising from the publication of true statements about him include *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 498-500 (1975) (Powell, J., concurring) and *Time, Inc.* v. *Firestone*, 424 U.S. 448, 458 (1976).

•• On two occasions within the last several years, this Court has been presented with cases which raised questions relating to the ability of government, acting civilly or criminally, to punish the press for publishing information obtained in connection with public judicial proceedings. In both *Cox Broadcasting Corp.* v. *Cohn*, *supra*, and *Oklahoma Publishing Co.* v. *District Court*, 97 S.Ct. 430 (1976), this Court refused to allow the states to abridge the freedom to publish.

to the name of a sitting judge against whom charges had been filed would be criminal—notwithstanding the recent admonition in Justice Brennan's concurring opinion in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 587 (1976) that:

"Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability."

The decision of the Supreme Court of Virginia is based upon the interest in assuring the high quality of the judiciary by permitting society to retire, censure or remove disabled or unfit judges. That such an interest exists and that it is significant we do not doubt: Chief Judge Traynor's admonition is telling "that in the judiciary, as in every other walk of life, a bad man is as hard to lose as a good man is hard to find." • Nor do we doubt that some "bad men" may be easier lost to the judiciary if there are no leaks from the Commission; but it may also be that the publication of such information will expose unfit judges and unfit commissions. The First Amendment,

• Traynor, *Who Can Best Judge the Judge?*, 42 Cal. State Bar J. 225, 238 (1967).

we submit, has made a choice for tension between government and the press in precisely such situations—and complete press freedom to publish the truth as it learns it. As phrased by the late Alexander Bickel:

> "[G]overnment may guard mightily against serious but more ordinary leaks, and yet must suffer them if they occur. Members of Congress as well as the press may publish materials that the government wishes to, and is entitled to, keep private. It is a disorderly situation surely. But if we ordered it we would have to sacrifice one of two contending values—privacy or public discourse—which are ultimately irreconcilable. If we should let the government censor as well as withhold, that would be too much dangerous power, and too much privacy. If we should allow the government neither to censor nor to withhold, that would provide for too little privacy of decision-making and too much power in the press and in Congress." (A. Bickel, *The Morality of Consent* 80 (1975))

Precisely the same, we believe, may be said of this case. The Commission may withhold and keep secret what it can; the press may print what it learns.* See generally, Stewart, *"Or of the Press"*, 26 Hastings L. Rev. 631 (1976). To the extent Va. Code § 2.1-37.13 is read to the contrary, as it was by the Supreme Court of Virginia, it is unconstitutional.

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* We recognize, as did Professor Bickel, the limitations on this principle which may arise in the unique circumstances discussed in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). Issues of national security are so far removed from the present context that we believe they need not be considered here.

II. *The Improper Imposition of Criminal Sanctions on the Press for its Publication in the Absence of Factual Proof Adduced in Evidence of a Clear and Present Danger to the Administration of Justice*

Assuming *arguendo* that the publication of truthful statements about public officials in connection with their public duties may ever result in the imposition of criminal sanctions, we submit that there can be no constitutionally satisfactory basis for imposition of such sanctions in this case.

On four separate occasions this Court has come to consider the claim that the interests of the administration of justice required that free expression with respect to the conduct of the judiciary be subjected to criminal sanctions. In each of those cases—*Bridges, Pennekamp, Craig* and *Wood*—this Court held the expression involved to be constitutionally protected.*

The statements at issue in this case published by *The Virginian-Pilot* are acknowledged in the indictment itself to be true. They are, as it happens, not even critical of the judge in question—concluding that the Commission had apparently found "insufficient cause for action or that

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* The language at issue about the judiciary in those cases was in many respects offensive and in some untrue. The editorials at issue in *Bridges* (entitled "Probation for Gorillas?") all but demanded that probation not be granted to two union members who had been found guilty of assault (314 U.S. at 271-72); the cartoon and editorials at issue in *Pennekamp* "wondered"—in a fashion which this Court agreed was unfair—whether the courts were being "subverted into refuges for lawbreakers" (328 U.S. at 337n); the editorials in *Craig*, during the pendency of a motion for a new trial, accused the elected layman judge of "arbitrary action" and of committing a "travesty on justice" in his earlier rulings which he was then reconsidering (331 U.S. at 379-80); and the offending language in *Wood* accused a judge of charging a then sitting grand jury "in the style and language of a race baiting candidate for political office." (370 U.S. at 380) All these cases involved the articulation of harsh opinion about the judiciary—not, as in this case, the statement of uncontestedly accurate facts.

the case is still under review." (31a) Yet it is the position of the Commonwealth—and now its Supreme Court—that the publication of such a news article may lead to criminal sanctions for the publisher in the interest of preserving the confidentiality of the judge under investigation. This, in turn, is justified on the grounds that the "reputation" of the judge might otherwise be injured and that "public confidence" in the judiciary might be otherwise diminished.*

As to these matters, the language of *Bridges* is still apt: in response to the similar concerns of "disrespect for the judiciary" and "disorderly and unfair administration of justice", this Court concluded that:

> "[A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." (314 U.S. at 270-71)

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* The only other interest cited by the Virginia Supreme Court to demonstrate the purposes served by confidentiality is the protection of complainants from judicial recriminations. This is not, strictly speaking, relevant to this case since Landmark's conviction relates only to the divulgence of the name of an accused judge. For reasons similar to those set forth in the text, however, we would urge, as well, that the First and Fourteenth Amendments do not permit the imposition for this reason of criminal punishment upon the press for its truthful reporting. We note also that this interest, in any event, is ill-served by a statute which prohibits the press from reporting on judicial misconduct—or indeed harassment of the complainants—but does not prohibit the judge from learning information which may well identify the complainants. Where, as here, the dynamics of the process effectively prevent any assurance of complete anonymity of complainants even in the absence of press reporting, the Virginia legislature should not be free to impose sanctions on the press in a bootless effort to achieve that which it cannot do. *See Nebraska Press Ass'n* v. *Stuart, supra*, 427 U.S. at 565-567.

There is still a further issue with respect to any application of the clear and present danger test to this case.* At the very least, application of that test has always required proof of *actual facts* that the expression in question created a danger of such immediate and grave magnitude that it could be punished. "[T]he likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press." *Bridges* at 262. This Court in *Craig* left no doubt concerning the standards:

> "The fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." (331 U.S. at 376)

By no interpretation can the Commonwealth's evidence be deemed to establish by actual facts that the publication of the judge's name and the fact he had been investigated constituted a clear and present danger to the administration of justice, which danger was substantial, immediate and imminent. Indeed, the opinion of the Virginia Supreme Court concedes as much. (11a)

In this Court's scathing denunciation of the state's failure to produce evidence and the trial court's failure to make any findings or to give any reasons *how* the statements in *Wood actually* interfered with the administration of justice, the Court stated:

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* The conclusion of the Supreme Court of Virginia of the existence of a clear and present danger is in no sense binding on the Court. Precisely such a conclusion was rejected by this Court, in the strongest terms, in *Wood*. More recently, this Court has overruled such findings of state supreme courts in *Nebraska Press Ass'n* v. *Stuart, supra* and *City of Madison* v. *Wisconsin Employment Relations Commission*, 97 S.Ct. 421 (1976).

"Despite its conclusion that the petitioner's conduct created a serious evil to the fair administration of justice, the Court of Appeals did not cite or discuss the *Bridges, Pennekamp* or *Harney* cases, nor did it display an awareness of the standards enunciated in those cases to support a finding of clear and present danger. It simply adopted as conclusions of law the allegations made in the contempt citation. The court did not indicate in any manner *how* the publications interfered with the grand jury's investigation, or with the administration of justice. Unlike those cases in which elaborate findings have been made to support such a conclusion, this record is barren of such findings. The prosecution called no witnesses to show that the functioning of the jury was in any way disturbed; no showing was made that the members of the grand jury, upon reading the petitioner's comments in the newspapers, felt unable or unwilling to complete their assigned task because petitioner 'interfered' with its completion. There is nothing in the record to indicate that the investigation was not ultimately successful or, if it was not, that the petitioner's conduct was responsible for its failure. . . . What interference to petitioner's hearing or what harm this assertion might inflict on the administration of justice is not stated in the opinion. Nor is there any evidence of either in the record.

"Thus we have simply been told, as a matter of law without factual support, that if a State is unable to punish persons for expressing their views on matters of great public importance when those matters are being considered in an investigation by the grand jury, a clear and present danger to the administration of justice will be created. We find no such danger in the record before us." (370 U.S. at 386-88)

The same questions asked by the Court in *Wood* may be asked of the Commonwealth in the instant case. Nowhere did the Commonwealth demonstrate *how* the publication interfered with the administration of justice. As in *Wood*, no prosecution witnesses were called to show how the functioning of any court or investigative body was or would be disturbed. In fact, here the Commonwealth called *no* witnesses at all. There was no showing that the Commission's proceedings were or would be in any fashion interfered with and, if so, how Landmark's conduct was responsible for the interference.

The holding of the Virginia Supreme Court as to the existence of a clear and present danger to the administration of justice caused by publication of Landmark's article is thus completely unsupported factually; it is also totally unsupported in the legislative history of the adoption of the statute at issue.

At the heart of the ruling of the Virginia Supreme Court is the conclusion that the Virginia legislature—as well as many other legislatures—found a clear and present danger to the administration of justice in the publication of articles such as are at issue here. In fact, there is absolutely nothing in the legislative history of the adoption of Va. Code § 2.1-37.13 which supports this conclusion. Nor does the Virginia Supreme Court cite to any portion of such history to support its conclusion.

There is, to be sure, the finding that proceedings shall be "confidential" and that the identity of accused judges shall not be "divulged" but there is not a word of legislative history to the effect that newspapers or others that learn of what has transpired in those proceedings may not disclose it. Thus, the repeated conclusion of the decision (13a-15a) that it is based upon "'the armor wrought by prior legislative deliberation'", *Bridges, supra*, 314 U.S.

at 261, is simply unsupported; there is no basis for concluding that the "deliberation" adverted to in *Bridges* occurred at all—at least as regards the imposition of criminal penalties upon newspapers for publishing what they learn of the proceedings of the Commission.*

Nor does the ruling below find support in the passage by other jurisdictions of what the Virginia Supreme Court refers to as "similar" statutes. In one sense, of course, it is plainly accurate to state that the statutes of the 34 other jurisdictions referred to by the Court are similar; in another, it is quite inaccurate. Of the other jurisdictions only *one*—Hawaii—makes it a crime to disclose any part of the proceedings held before the judicial inquiry commission.** Each of the other jurisdictions requires confidentiality; none of the others criminally punishes anyone, let alone the press, for breach of that confidentiality. Thus, the conclusion of the Supreme Court of Virginia as to the "indispensable" nature of criminal sanctions to enforce confidentiality is all but unsupported outside Virginia—as well as lacking support in the legislative history within Virginia.

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* Justice Frankfurter's dissenting opinion in *Craig* is noteworthy for its apparent rejection of the notion that legislative acts relating to supposed clear and present dangers to the administration of justice come to this Court more shielded from First Amendment challenge than do judicial rulings of contempt. *See* 331 U.S. at 384-85. Professor Emerson, as well, agrees that the *Bridges* line of cases would have been decided identically, even if they had arisen under criminal statutes. T. Emerson, *The System of Freedom of Expression* 456 (1970).

** Rule 16 of the Rules of Practice and Procedure of the Hawaii Commission for Judicial Qualification provides that:

> "[a]ny commission member or individual, including the individual making the charge, who divulges information concerning the charge prior to the certification [thereof] . . . shall be guilty of a felony. . . ."

No clear and present danger to the administration of justice conceivably sufficient to warrant the overriding of First Amendment rights has been demonstrated in this action.

III. *The Vagueness and Overbreadth of Va. Code § 2.1-37.13*

This Court has frequently indicated the special caution with which it views—and reads—statutes limiting freedom of expression. As the Court observed in *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966):

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer."

See also Erznoznik v. *City of Jacksonville*, 422 U.S. 205, 217-218 (1975) ["Where First Amendment freedoms are at stake . . . precision of drafting and clarity of purpose are essential."]; *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964). The constitutional test of definiteness is particularly strict in the case of a criminal statute such as Va. Code § 2.1-37.13. *E.g.*, *NAACP* v. *Button*, 371 U.S. 415, 432-33 (1963); *Winters* v. *New York*, 333 U.S. 507, 515-16 (1948). And this Court has recently repeated that it takes "special care to insist on fair warning when a statute regulates expression and implicates First Amendment values." *Marks* v. *United States*, 45 U.S.L.W. 4233, 4235 (U.S. March 1, 1977).

The application of Va. Code § 2.1-37.13 to the publication of *The Virginian-Pilot* on October 4, 1975 runs afoul of all these cautionary strictures. The statutory language provides that "[a]ll papers filed with and proceedings before the Commission . . . including the identification of

the subject judge as well as all testimony and other evidence . . . shall be confidential and shall not be divulged by any person to anyone except the Commission. . . ." The statute does not define the meaning of the word "divulge".

At trial, counsel for Landmark urged—based upon the definition contained in *Webster's Third International Dictionary* (1961)—that "divulge" concerned the first act of disclosure only and that information became public upon, and only upon, its first disclosure. (JA 13) The Commonwealth responded—based upon the definition in *Webster's Second College Edition*—that divulge meant "to make public." (JA 39) The decision of the Supreme Court of Virginia here at issue—relying upon *Black's Law Dictionary* (4th ed. 1951)—held that divulge meant "to disclose [information] or make it known." "Clearly", the Virginia Supreme Court ruled, Landmark violated the statute. (5a) But, as the conflict of the dictionaries suggests, the legal meaning of "divulge", let alone a discernible legislative intent to apply the statute to newspapers, is far less clear.*

For one thing, as we have previously discussed, there is *no* legislative history on point, save only a general intent that proceedings be "confidential". Indeed, when the Virginia legislature has previously intended to adopt a statute *prohibiting* newspapers from publishing material, it has done so with no vagueness at all. Va. Code § 53-322 thus provides that "[n]o newspaper or person shall print or publish the details of the execution of criminals. Only the fact that the criminal was executed shall be printed or published." **

* Counsel for the Commonwealth even conceded that "there is a different interpretation or a different definition for that word—'to make public.'" (JA 39)

** We do not, of course, concede the constitutionality of that statute which we believe to be facially violative of the First and Fourteenth Amendments.

Moreover, not only is the dictionary definition of "divulge" in dispute: the cases indicate that statutes will not so easily be interpreted to make "divulge" and "publish" synonymous.*

The vagueness of the statute is hardly limited to the ambiguity of the word "divulge". On its face, the statute seems limited to disclosure of certain specified materials filed with or proceedings before the Commission.

> "All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11, 2.1-37.12), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission. . . ."

The indictment and the scant record of this case do not indicate that the information allegedly "divulged" consisted of "papers filed with and proceedings before the Commission." Yet the Commonwealth's prosecution necessarily assumed that the statute, despite its specific and limited language, intended to include all matters pertain-

* In *United States* v. *Baltimore Post Co.*, 2 F.2d 761, 764 (D. Md. 1924), *aff'd*, 268 U.S. 388 (1925), for example, the word "publish" was held to mean "to make public"; it was held as well to mean something different from "to make known" or "to divulge." Closer to the present case, Judge Gurfein, in *New York Times Co.* v. *United States*, 328 F.Supp. 324 (S.D.N.Y.), *remanded*, 444 F.2d 544 (2d Cir.), *rev'd*, 403 U.S. 713 (1971), held that in the absence of language explicitly barring "publication" as opposed to "communication" of particular materials relating to national defense, he would not read portions of the Espionage Act to permit the imposition of criminal sanctions with respect thereto. *See also*, *New York Times Co.* v. *United States*, *supra*, 403 U.S. at 720 (Opinion of Douglas, J., concurring), 740 (Opinion of Marshall, J., concurring).

ing to a proceeding. The Virginia Supreme Court apparently agreed, holding that the statute

> "In unmistakable terms . . . states that *all information concerning a proceeding before the Commission,* including the identity of the judge who is the subject of the inquiry shall be confidential. . . ." (4a)

This interpretation allows affirmance of the conviction, but surely goes beyond the words of the statute. It presents a significant problem of fair notice and itself raises a question as to the sweep of "all information concerning a proceeding before the Commission." •

The vagueness of Va. Code § 2.1-37.13 as applied to Landmark thus results from several factors: it did not give "fair warning" that it applied to parties who obtain information after the initial disclosure by parties privy to the information; it gave no warning at all that its intended sweep encompassed the press; and it did not indicate that it applied to "all information concerning a proceeding" whether or not such information was obtained from material before the Commission. The First and Fourteenth Amendments do not permit criminal sanctions to be imposed upon the press under those circumstances.

As is often the case, unconstitutional overbreadth is a close relative of unconstitutional vagueness. Note, *The First*

• The interpretation offered by the Virginia Supreme Court still seems to leave in doubt a number of significant questions: Does it, for example, bar a newspaper from reprinting information previously published by other newspapers or news services? Does the statute prohibit a newspaper from reporting on open session of a house of the state legislature in which the reappointment of a judge investigated by the Commission was discussed?

Amendment Overbreadth Doctrine, 83 Harv.L.Rev. 844 (1970). Here what is involved is a statute which is neither "narrowly drawn" nor one which, at least as it is now said to relate to the press, represents "a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society". *Broadrick* v. *Oklahoma,* 413 U.S. 601, 611-12 (1973). In an attempt to clarify such a statute, the Virginia Supreme Court has so extended the sweep of the statute as to catch up actions which, under any interpretation of the Constitution, are protected.

As interpreted by the Virginia Supreme Court, the statute at issue makes it a crime *ever* to identify a judge who is or has been investigated by the Commission, unless charges are publicly filed against him. Thus, if a newspaper believes some impropriety has prevented an incompetent judge from having formal charges filed against him, it could never print it, except at the risk of imposition of criminal sanctions. Similarly, if a complainant concluded that the Commission had improperly rejected a complaint filed by him, he could never express his views—at least if the judge's name or any detail relating to the proceedings at which the complainant testified is contained in his condemnation. That much, if not all, of such conduct is constitutionally protected seems evident. Thus, the statute is overbroad in proscribing acts "which may legitimately be proscribed" as well as acts "which may not be proscribed." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 609 (1967); *see also United States* v. *Robel,* 389 U.S. 258, 265-66 (1967).

The unconstitutional overbreadth of the statute is demonstrated as well by the sweep of the conclusion of the Supreme Court of Virginia that what is "clearly" forbidden by the statute is the disclosure by "any person" to anyone else of "information" which is "still . . . confidential"—

e.g., information not contained in the public filing of a complaint in the Virginia Supreme Court by the Commission. Thus, readers of the article published in *The Virginian-Pilot* repeat what they read at their peril; one who hears from someone else what he heard from someone else about the identity of an accused judge repeats it at his peril; and the like. The Constitution does not permit such results.

CONCLUSION

The issues raised by this appeal relate to the heart of the First Amendment; news reporting and editorial comment concerning the administration of justice. In upholding the constitutionality of Va. Code § 2.1-37.13 as applied to Landmark and in affirming Landmark's conviction for publishing *The Virginian-Pilot* on October 4, 1975, the Supreme Court of Virginia ignored fundamental First Amendment principles. The questions presented by this appeal are indeed substantial and we urge this Court to note probable jurisdiction and set the case down for argument.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Virginia

OPINION BY JUSTICE HARRY L. CARRICO

Richmond, Virginia, March 4, 1977

Present: All the Justices

Record No. 760596

LANDMARK COMMUNICATIONS, INC.

v.

COMMONWEALTH OF VIRGINIA.

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK
Alfred W. Whitehurst, Judge

The principal question in this case involves a confrontation between the First Amendment guaranty of freedom of the press and a Virginia statute which imposes criminal sanctions for breach of the confidentiality of proceedings before the Judicial Inquiry and Review Commission. A preliminary question is whether the appellant-newspaper is subject to the proscription of the statute.

Creation of the Judicial Inquiry and Review Commission was mandated by Article VI, Section 10 of the 1971 Constitution of Virginia for the purpose of investigating charges concerning disabled and unfit judges. The constitutional provision specifies that "[p]roceedings before the Commission shall be confidential."

The Commission was actually created by the General Assembly in 1971, at its session held to implement the new constitution. (1971 Va. Acts Spec. Sess. ch. 154; Va. Code §§ 2.1-37.1 *et seq.*) In the act creating the Commission, its powers and duties are outlined with detail. By the terms of Va. Code § 2.1-37.4, the Commission is empowered to investigate charges "which would be the basis for retirement, censure, or removal of a judge under § 10 of Article VI of the Constitution." If the Commission finds the charges well-founded and sufficient to constitute the basis for retirement, censure, or removal of a judge, it shall file a formal complaint with this court.[1] Virginia Code § 2.1-37.13[2] provides in pertinent part that

[1] Under Article VI, Section 10 of the Constitution, if this court finds the judge disabled to perform his duties, it shall retire him; if it finds he has engaged in misconduct while in office, it shall censure or remove him.

[2] "§ 2.1-37.13. *Confidentiality of papers and proceedings.*—
All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11, 2.1-37.12), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character. However, if the Commission shall find cause to believe that any witness under oath has willfully and intentionally testified falsely, the Commission may direct the chairman or one of its members to report such finding and the details leading thereto including any transcript thereof to the Commonwealth's attorney of the city or county where such act occurred for such disposition as to a charge of perjury as the Commonwealth may be advised. In any subsequent prosecution for perjury based thereon, the proceedings before the Commission relevant thereto shall lose their confidential character.

All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal, shall be kept in the confidential files of the Commission.

Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."

"[a]ll papers filed with and proceedings before the Commission . . . including the identification of the subject judge . . . shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character." The Code section provides further that "[a]ny person who shall divulge information in violation . . . of this section shall be guilty of a misdemeanor."

The appellant, Landmark Communications, Inc., publishes *The Virginian-Pilot*, a newspaper of general circulation in the Tidewater area of Virginia. On October 4, 1975, the newspaper published an article stating that the Commission had conducted a "formal hearing concerning possible disciplinary action against" a judge, identified by name, of a court not of record in the City of Norfolk. The article recited further that the hearing "apparently stemmed from charges of incompetence against the . . . judge."

On November 5, 1975, Landmark was indicted for unlawfully divulging the identity of a judge who was "the subject of an investigation and hearing by the Judicial Inquiry and Review Commission." Upon trial of the indictment by the court without a jury, it was stipulated that Landmark had published the article in question; that the Commission had investigated charges and conducted hearings concerning the judge named in the article; and that, at the time of the publication, the Commission had not filed a complaint with this court respecting the judge.[3] Landmark was convicted of the charge laid in the indictment, and it was fined the sum of $500.00.

[3] As of the date of this opinion, no complaint had been filed with this court concerning the judge in question.

On appeal, Landmark contends that it is unclear from a reading of Va. Code § 2.1-37.13 whether the statute's proscription against divulging information concerning a Commission proceeding applies not only to the participants in such a proceeding but also to a newspaper which publishes information obtained from one of the participants. Because the statute is penal in nature, Landmark argues, it must be strictly construed, and any doubt or ambiguity concerning its application must be resolved against the Commonwealth and in favor of one accused of its violation.

When the doubt or ambiguity in § 2.1-37.13 is so resolved, Landmark asserts, the statute should be construed to mean that a violation may occur only upon "the *first act of disclosure* . . . by an individual who had *actually participated* in some manner in the proceedings of [the] Commission." Under this construction and the circumstances of this case, Landmark concludes, the information concerning the judge in question "lost its confidentiality" and "became public upon its first disclosure" by a participant in the proceedings, and all Landmark did was to publish information "which was *voluntarily and freely* given to it."[4]

While we agree with Landmark that the statute must be construed strictly, we disagree with the remainder of its argument. We hold that Va. Code § 2.1-37.13 does not suffer the doubt or ambiguity asserted by Landmark.

In unmistakable terms, the statute states that all information concerning a proceeding before the Commission, including the identity of the judge who is the subject of the inquiry, shall be confidential and that this

[4] The record is silent, however, concerning the manner in which Landmark secured the information.

confidentiality shall continue until a formal complaint against the judge is filed with this court. So far as is pertinent here, only upon the filing of such a complaint is the record of a proceeding before the Commission placed in the public domain; only then does information concerning a proceeding before the Commission lose its confidential character.

Until a complaint is filed with this court, the proscription of the statute is applicable to punish any *person* who *divulges* any information concerning a proceeding before the Commission. Although Landmark is a corporation, by the force of Va. Code § 1-13.19,[5] it is a "person" within the meaning of Va. Code § 2.1-37.13. To "divulge" information means to disclose it or to make it known. *Black's Law Dictionary* 567 (4th ed. 1951). When Landmark published its article, it disclosed or made known to the public at large information which still was confidential.

The proscription of Va. Code § 2.1-37.13 is so clear that it would be unreasonable to construe the statute, as Landmark interprets it, to mean that only the participants in a Commission proceeding are subject to the prescribed sanctions or that only the first disclosure of confidential information is actionable. Clearly, Landmark's actions violated Va. Code § 2.1-37.13 and rendered it liable to imposition of the sanctions prescribed by the statute.

But, Landmark contends, to impose upon it the sanctions prescribed by Va. Code § 2.1-37.13 would unconstitutionally abridge its First Amendment guaranty of freedom of the press. This contention poses the serious question in the case and presents an issue not decided

[5] "§ 1-13.19. *Person.*—The word 'person' may extend and be applied to bodies politic and corporate as well as individuals."

previously by this court or, so far as our research discloses, by any other appellate court in this country. The importance of the question is emphasized when it is considered that 34 jurisdictions in addition to Virginia, by constitutional provision, statute, or rule, require confidentiality of proceedings before bodies similar to our Judicial Inquiry and Review Commission.[6]

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press." Clearly, "the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Nebraska Press Ass'n* v. *Stuart*, —— U.S. ——, 49 L.Ed.2d 683, 696 (1976). Freedom of the press, however, is not an absolute right, and the state may punish its abuse. *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931). But when and under what circumstances a state may punish such an abuse is the difficult question, given the uncertainty created by the numerous decisions interpreting First Amendment rights.

From a review of the decisions of the United States Supreme Court involving restrictions upon First Amendment freedom of the press, it appears that the cases fall into three general categories: (1) denial of right of access to information; (2) prior restraint upon publication; and (3) subsequent punishment for publication. The

[6] Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin, and Wyoming. American Judicature Society, *Judicial Disability and Removal Commissions, Courts and Procedures* (1973).

present case involves no denial of access; Landmark concedes that it has no greater constitutional right of access than the general public to information concerning Commission proceedings. *See Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974); *Pell* v. *Procunier*, 417 U.S. 817 (1974).

While conceding that it is "difficult to determine whether the instant case is a 'prior restraint' or 'subsequent punishment' case," Landmark contends that Va. Code § 2.1-37.13 does impose a prior restraint upon publication. Prior restraints, Landmark asserts, bear a heavy presumption against their constitutional validity, *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971), and are permissible only (1) to protect the national security, (2) to prevent the publication of obscenity, and (3) to prohibit expression associated with situations which tend to incite acts of violence and the overthrow by force of government. *Near* v. *Minnesota*, 283 U.S. at 716. Because the publication in the present case does not fall within one of these exceptions, Landmark concludes, the prior restraint imposed by Va. Code § 2.1-37.13 is constitutionally impermissible.

We are of opinion, however, that Va. Code § 2.1-37.13 does not impose a prior restraint upon publication. Generally, prior restraints take the form of injunctions, requirements for licenses or permits, or censorship or previous review. Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 Notre Dame Lawyer 898 (1975-1976). A prior restraint "has an immediate and irreversible sanction." *Nebraska Press Ass'n* v. *Stuart*, —— U.S. at ——, 49 L.Ed.2d at 697-98. By contrast, Va. Code § 2.1-37.13 seeks to preserve the confidentiality of Commission proceedings by providing for the imposition of criminal sanctions *after* the statute

has been violated. Thus, Virginia's proscription fits properly within the "subsequent punishment" category of cases.

The distinction between "prior restraint" and "subsequent punishment" is based upon "a theory deeply etched in our law," *viz.*, that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 559 (1975). Accordingly, the "presumption against prior restraints is heavier—and the degree of protection broader —than that against limits on expression imposed by criminal penalties." *Id.* at 558-59.

But even though this may be a "subsequent punishment" case and not subject to the heavy presumption against invalidity, Landmark argues, it does not follow that publication of the article in question is punishable by the Commonwealth. In "subsequent punishment" cases, Landmark asserts, the Supreme Court's decisions require that before a state may punish a violation of a restriction upon expression, it must satisfy the "clear and present danger" test. This test, opines Landmark, requires the state to prove by "actual facts" that the expression it seeks to prohibit would result in an evil which is substantial and imminent, posing a clear and present danger to a legitimate governmental interest.

The governmental interest involved here, Landmark says, is the orderly administration of justice; the burden was upon the Commonwealth, therefore, to prove by "actual facts" that publication of the article in question created a clear and present danger to the administration of justice in Virginia. Because the Commonwealth failed to produce "actual facts" showing a clear and present danger, Landmark concludes, the judgment imposing the

sanction upon it is invalid under Supreme Court decisions interpreting the First Amendment.

Upon examination of the Supreme Court's decisions, we find that the "clear and present danger" standard was enunciated in *Schenck* v. *United States,* 249 U.S. 47 (1919). *Schenck* involved defendants charged with circulating printed matter alleged to constitute a violation of the Espionage Act of June 15, 1917. In defense, the First Amendment freedoms of speech and press were asserted. In the course of its opinion upholding the convictions, the Court stated:

> "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . . We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done . . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." 249 U.S. at 51-52.

Subsequently, in a series of decisions, the Supreme Court applied the "clear and present danger" test to cases in-

volving publications allegedly perilous to the orderly administration of justice. In *Bridges* v. *California*, 314 U.S. 252 (1941), *Pennekamp* v. *Florida*, 328 U.S. 331 (1946), *Craig* v. *Harney*, 331 U.S. 367 (1947), and *Wood* v. *Georgia*, 370 U.S. 375 (1962), the Court reversed convictions for contempt based upon out-of-court comment concerning pending cases. In each instance, the Court held that the particular expression involved was insufficient to pose a clear and present danger to the orderly administration of justice and, therefore, was protected by the First Amendment.

Bridges defined the scope of the "clear and present danger" standard. There, the Court stated:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment . . . does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." 314 U.S. at 263.

It is upon *Bridges*, *Pennekamp*, *Craig*, and *Wood* that Landmark relies to support its assertion that before a state may punish expression, it must prove by "actual facts" the existence of a clear and present danger to the orderly administration of justice. *Bridges*, however, does not men-

tion any requirement of evidence to establish a clear and present danger. But in *Craig*, the Court analyzed *Bridges* to have held that:

> "[T]he compulsion of the First Amendment, made applicable to the States by the Fourteenth . . . forbade the punishment by contempt for comment on pending cases in absence of *a showing* that the utterances created a 'clear and present danger' to the administration of justice." 331 U.S. at 372 (emphasis added).

And, in *Pennekamp*, the Court stated:

> "For circumstances to create a clear and present danger to judicial administration, *a solidity of the evidence* should be required. . . ." 328 U.S. at 347 (emphasis added).

Finally, in *Wood*, after criticizing the trial court for "simply [adopting] as conclusions of law the allegations made in the contempt citation," 370 U.S. at 387, the Court stated:

> "Hence, in the absence of *some other showing* of a substantive evil actually designed to impede the course of justice in justification of the exercise of the contempt power to silence the petitioner, his utterances are entitled to be protected." 370 U.S. at 389 (emphasis added).

We agree with Landmark that there is no evidence in the record favorable to the Commonwealth's position beyond the stipulated facts showing Landmark had published the article in question, the Commission had investigated charges and conducted hearings concerning the judge named in the article, and, at the time of the publi-

cation, the Commission had not filed a complaint with this court respecting the judge. And we agree that Landmark cannot be punished for publishing the confidential information contained in the article unless the revelation created a clear and present danger to a legitimate state interest—the orderly administration of justice. But we do not agree with Landmark that, because the Commonwealth did not produce other evidence by way of "actual facts" to show a clear and present danger, *Bridges, Pennekamp, Craig,* and *Wood* require reversal of the judgment of the trial court.

In our opinion, the present case differs substantially from *Bridges, Pennekamp, Craig,* and *Wood.* Those decisions involved the *common law power* of a court to punish allegedly contemptuous out-of-court statements concerning pending cases. Necessarily, therefore, the imposition of sanctions in such circumstances was based, as the Court noted in *Bridges,* upon a "'concept of the most general and undefined nature.'" 314 U.S. at 260. Because the common law power of contempt is so general and undefined, the Court was concerned that, without evidence of a clear and present danger, fair public comment and criticism concerning a judge and the conduct of his judicial affairs would be "effectively discouraged." *Bridges,* 314 U.S. at 269.

By contrast, in the present case, the power of a Virginia court to punish out-of-court statements of the type published by Landmark is fixed by statute, Va. Code § 2.1-37.13, and the substantive offense for which the punishment may be imposed is clear and well-defined. The restraint upon expression imposed by the statute is limited, and it is related solely to the purpose sought to be served by the legislation: the preservation of the confi-

dentiality of Commission proceedings. The statute does not seek to discourage any comment or criticism concerning a judge or the conduct of his judicial affairs save the disclosure of information resulting from a breach of the confidentiality of Commission proceedings.

Virginia Code § 2.1-37.13 represents a legislative declaration by the General Assembly, fortified by a plain statement of public intent expressed in the Virginia Constitution, that a clear and present danger to the orderly administration of justice would be created by divulgence of the confidential proceedings of the Commission. We believe this legislative declaration elevates the restriction upon speech and press involved in this case to a level of legal dignity not enjoyed by the contempt judgments involved in *Bridges, Pennekamp, Craig,* and *Wood.* Indeed, in *Wood,* which involved a Georgia contempt proceeding, the Supreme Court stated:

> "Initially, however, it should be noted that the Georgia courts have determined that the power to punish for contempt of court is inherent in its state judiciary . . . and the Court of Appeals thus ignored the express limitations imposed by the Georgia Legislature in punishing out-of-court statements . . . . This holding thus deprives the judgment of coming to this Court 'encased in the armor wrought by prior legislative deliberation' . . . ." 370 U.S. at 385-86.

And, in *Bridges,* which involved a California contempt proceeding, the Supreme Court said:

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending

> case in a specified manner should be punishable. As we said in *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. . . .' [H]ere the legislature of California has not appraised a particular kind of situation and found a specific danger . . . sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that 'it must necessarily be found, as an original question,' that the specified publications involved created 'such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection'." 314 U.S. at 260-61.

As we have noted, the imposition of punishment upon Landmark in this case does not depend upon some undefined concept of judicial authority. Instead, the sanction imposed springs from a clear and well-defined legislative declaration that breach of the confidentiality of Commission proceedings is so contrary to the public interest[7] that

[7] *Cf. Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), a case involving a civil action for breach of privacy. The Supreme Court held that the First Amendment protected the revelation in a television broadcast of the name of a rape victim, although the disclosure was violative of a Georgia statute which made it a misdemeanor to publish or broadcast the name. The news reporter, however, had obtained the victim's name from the indictment in the criminal case, which was a public record made available to the reporter for his inspection. The Court stated:

> "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." 420 U.S. at 495.

it constitutes a substantive evil of immediate and serious peril to the orderly administration of justice and, therefore, should be punishable. Accordingly, we believe the judgment imposing the sanction in this case is fortified against Landmark's constitutional attack because it is "encased in the armor wrought by prior legislative deliberation," and it is strengthened further by the requirement of the Virginia Constitution that proceedings before the Commission "shall be confidential."

We must note, however, that in the *Bridges* opinion the Supreme Court did observe: "even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression." 314 U.S. at 263. But we believe the matters which, in the first place, prompted creation of the Judicial Inquiry and Review Commission, dictated the requirement of the Virginia Constitution that proceedings of the Commission "shall be confidential," and necessitated the enactment of the sanctions prescribed by Va. Code § 2.1-37.13, are much more than "minor matters of public inconvenience or annoyance." They are matters involving a serious and substantive evil—the imminent and substantial threat to the orderly administration of justice posed by the premature disclosure of the confidential proceedings of the Judicial Inquiry and Review Commission. And they are matters upon which courtroom evidence is unnecessary to sustain their truth and validity.

History tells us that the methods of dealing with disabled or unfit judges by legislative impeachment[8] or re-

[8] Section 54 of the Constitution of 1902 (Article IV, Section 17 of the Constitution of 1971).

moval,[9] existing prior to creation of the Commission, were seldom used and generally unsatisfactory. The inadequacies of those methods prompted inquiry into other means of handling problem judges. Led by California, numerous jurisdictions have created commissions or other bodies to investigate complaints against judges. Along with Virginia, many of the jurisdictions have imposed requirements of confidentiality in commission proceedings. Note 6, *supra*.

The necessity for confidentiality of commission proceedings is self-evident from this statement:

> "Proceedings before the Commission must be confidential. The initial job of the Commission will be to ascertain which complaints have sufficient merit to deserve serious attention. Obviously there is the risk that a disappointed litigant may seek to vent his wrath upon the judge by filing a complaint with the Review Commission, or that complaints will be filed upon other vexatious and frivolous grounds. Such complaints must be weeded out—hence the requirement of confidentiality of Commission proceedings." A. Howard, *Commentaries on the Constitution of Virginia* 764 (1974).

The California experience furnishes support for the confidentiality of commission proceedings:

> "A prime feature of the Commission plan for judicial discipline is that, unlike the impeachment, recall, and election processes, the charges, and investigation thereof, are not made public until and unless a recommendation for censure, removal or retirement is made to the Supreme Court. The proceedings are entirely confidential up to that point. This gives the individual judge and thereby the judiciary reputation protection until a full scale investigation has been made and a competent body of peers has made an adverse decision on the merits of the charge. The shield of confidentiality also preserves reputations while the corrective influence of the Commission is being exerted on a judge who would otherwise be reluctant to change his behavior lest the public view this as an admission of prior misconduct . . . . Thus, reputations are preserved while allowing ample opportunity for complete investigation and voluntary corrective action." Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal With Judicial Misconduct*, 3 U.S.F.L. Rev. 244, 255-56 (1968-1969).

[9] Section 104 of the Constitution of 1902 (omitted from the new constitution).

Florida requires confidentiality of proceedings before its Judicial Qualifications Commission, the counterpart of our Judicial Inquiry and Review Commission. In discussing the Commission, the Florida Supreme Court has stated:

> "The purpose is to process complaints concerning the judiciary from any and all sources, while requiring confidentiality as a means to protect both the complainant from possible recriminations and the judicial officer from unsubstantiated charges . . . . Eliminating the confidentiality of these proceedings would also eliminate many sources of information and complaints received by the Commission not only from lay citizens and litigants but also from lawyers and judges within

the system." *Forbes* v. *Earle*, 298 So.2d 1, 4 (Fla. 1974).

Thus, the requirement of confidentiality in Commission proceedings (1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious.

Considering these matters, we believe it can be said safely, without need of hard in-court evidence, that, absent a requirement of confidentiality, the Judicial Inquiry and Review Commisison could not function properly or discharge effectively its intended purpose. Thus sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings—the imminent impairment of the effectiveness of the Commission and the accompanying immediate threat to the orderly administration of justice.

The ultimate and real concern in this type of case is exemplified by a statement in *Pennekamp* v. *Florida:*

> "[R]eviewing courts are brought in cases of this type to appraise the [press] comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes." 328 U.S. at 336.

We recognize the public interest in information pertaining to judicial discipline and in free debate upon the con-

duct of the judiciary. *See Wood* v. *Georgia*, 370 U.S. at 392. We find, however, that the statute in question places the least possible restraint upon this public interest while, at the same time, it assures effective functioning of the Commission. When a complaint is filed with this court, the entire record of the Commission's proceedings becomes public. And, as we have noted previously, the statute does not curtail general comment or criticism concerning a judge or the conduct of his judicial affairs.

On balance, therefore, we find that the necessity of maintaining the integrity of the Judicial Inquiry and Review Commission as an essential component in the administration of justice clearly outweighs any possible advantage of public disclosure of the Commission's proceedings prior to the filing of a complaint with this court. Accordingly, we affirm the judgment of the trial court.

Affirmed.

POFF, *J.*, dissenting.

I dissent. The judgment should be reversed and final judgment should be entered for the defendant. In my view, the statute should be construed not to apply to this defendant under these circumstances. Construed otherwise, the statute offends the First Amendment.

As the parties agree and the majority recognize, there is utterly no evidence of record showing a "clear and present danger". The majority simply conclude that the General Assembly concluded that there was a danger so clear and present as to justify a statutory abridgement of the right to publish. The majority reach their conclusion unaided by legislative history and without benefit of a declaration of such danger in the statute or the Constitution which mandates the statute. Just as a court

cannot infer the existence of a clear and present danger from allegations made in a contempt citation and adopt that inference as a conclusion of law, *Wood* v. *Georgia,* 370 U.S. 375 (1962), a court cannot infer the existence of a clear and present danger from the mere enactment of a penal statute.

If a restriction upon publication of lawfully-acquired information concerning the proceedings of a commission reviewing charges against a judicial officer can be constitutionally justified by a simple conclusion that publication poses a clear and present danger to the administration of justice, a similar conclusion could justify a similar restriction with reference to the proceedings of a commission reviewing charges against an executive officer or a legislator.

I simply believe that, in order to justify a statutory exception to the constitutional guarantee, there must be an *evidentiary* showing of a clear and present danger to a legitimate governmental interest, and an evidentiary showing that the statutory sanction is the minimum necessary to meet that danger and protect that interest. The legal presumption is in favor of the First Amendment and against the exception, and legal presumptions survive until rebutted by evidence.

APPENDIX B

Order Finding Landmark Guilty as Charged

VIRGINIA:

In the Circuit Court of the City of Norfolk, on the 15th day of January, in the year 1976.

• • • • •

This day again came Landmark Communications, Inc., a Virginia Corporation, who stands indicted for Divulging Identification of Judge Subject of Investigation and Hearing of Judicial Inquiry and Review Commission, in the person of its representative, Glen Hampton, and came as well the Attorney of the Commonwealth in the person of Joseph H. Campbell and the Attorney for the Accused in the person of Conrad M. Shumadine, pursuant to continuance order entered on the 10th day of December 1975; and it appearing to the Court that the accused was tried on the 10th day of December 1975 on a misdemeanor indictment for Divulging Identification of Judge Subject of Investigation and Hearing of Judicial Inquiry and Review Commission, and the matter of a finding having been taken under advisement, and now being fully heard and determined by the Court; the Court doth find the defendant Guilty as charged in the said misdemeanor indictment and doth fix punishment at a fine in the sum of five hundred dollars ($500.00) and that the defendant be required to pay the costs of prosecution.

APPENDIX C

Statutes Involved

Chapter 4.1.

Judicial Inquiry and Review Commission.

Article 1.

General Provisions.

§ 2.1-37.1. Definitions and application of chapter.—As used in this chapter, *"Commission"* means the Judicial Inquiry and Review Commission provided for in § 10 of Article VI of the Constitution, *"subordinate courts of record"* means all courts of record except the Supreme Court, and *"judge"* means a justice of the Supreme Court, judge of a subordinate court of record, judge of a court not of record, member of the State Corporation Commission, or a member of the Industrial Commission of Virginia, all of whom shall be subject to investigations and proceedings under the provisions of this chapter. (1971, Ex. Sess., c. 154.)

§ 2.1-37.2. Jurisdiction of Supreme Court.—In addition to the jurisdiction conferred on the Supreme Court by § 1 and § 10 of Article VI of the Constitution, to conduct hearings and impose sanctions upon the filing by the Commission of complaints against justices of the Supreme Court, judges of other courts of record, and members of the State Corporation Commission, the Supreme Court by virtue of this chapter shall have the same jurisdiction, to be exercised in the same manner, upon the filing by the Commission of complaints against all other judges as defined herein. (1971, Ex. Sess., c. 154.)

§ 2.1-37.3. Commission created; membership and terms of office.—There is hereby created a Judicial Inquiry and Review Commission, composed of five persons who shall be citizens and residents of this Commonwealth. The members of the Commission shall be chosen by the vote of a majority of the members elected to each house of the General Assembly. The Commission, annually, shall elect one of its members to be chairman of the Commission for the ensuing year.

The Commission shall consist of two judicial members, who shall be active judges of subordinate courts of record; two lawyer members, who shall be active members of the Virginia State Bar who are not judges and who have practiced law in this State for fifteen or more years immediately preceding their appointment; and one public member who shall not be an active or retired judge and shall never have been a licensed lawyer.

The term of office of each member shall be four years commencing on July first, except that the initial terms commencing on July first, nineteen hundred seventy-one shall be as follows: the term of one lawyer member shall be one year; the term of the public member shall be two years; the term of one judicial member shall be two years; the term of one lawyer member shall be three years; and the term of one judicial member shall be four years. No member of the Commission shall be eligible to serve more than two consecutive terms.

Commission membership terminates whenever a member resigns or ceases to possess the qualifications that made him eligible for appointment. During any vacancy which may exist while the General Assembly is not in session, the Governor may appoint a successor to serve until thirty days after the commencement of the next session of the General Assembly. Upon election of a successor by the General Assembly, the new member of the Commission

shall serve for the remainder of the term of office of his predecessor.

Any member of the Commission who is the subject of an investigation or hearing by it or is otherwise personally involved therein shall be disqualified by the Commission from acting in such proceedings. In such a case the Governor shall appoint a person possessing the original qualifications of such member as prescribed by this section to serve temporarily as a substitute member of the Commission in such proceedings. (1971, Ex. Sess., c. 154.)

§ 2.1-37.4. Powers and duties of Commission generally.—The Commission is hereby vested with the power, and it shall be its duty, to investigate charges arising out of the present or any prior term of office which would be the basis for retirement, censure, or removal of a judge under § 10 of Article VI of the Constitution and the provisions of this chapter even though the subject judge may have been reelected to a new term of office.

The Commission, after such investigation as it deems necessary, may order and conduct hearings at such times and places in the State as it shall determine.

If the Commission finds the charges to be well-founded, and sufficient to constitute the basis for retirement, censure, or removal of a judge, it may file a formal complaint before the Supreme Court. (1971, Ex. Sess., c. 154.)

§ 2.1-37.5. Power to make rules.—The Commission shall have the authority to make rules, not in conflict with the provisions of this chapter or of general law, to govern investigations and hearings conducted by it. (1971, Ex. Sess., c. 154.)

§ 2.1-37.6. Concurrence of majority in acts of Commission required.—No act of the Commission shall be valid

unless concurred in by a majority of its members. (1971, Ex. Sess., c. 154.)

§ 2.1-37.7. Officers and employees; experts and reporters; witnesses; legal counsel.—The Commission may employ such officers, assistants, and other employees as it deems necessary for the performance of the duties and exercise of the powers conferred upon it, may arrange for and compensate medical and other experts and reporters, may arrange for attendance of witnesses, including witnesses not subject to subpoena, and may pay from funds available to it all expenses reasonably necessary for effectuating the purposes of § 10 of Article VI of the Constitution and the provisions of this chapter, whether or not specifically enumerated herein. The Attorney General shall, if requested by the Commission, act as its counsel generally or in any particular investigation or proceeding.

The Commission may employ special counsel from time to time when it deems such employment necessary, notwithstanding the provisions of § 2.1-122 of the Code of Virginia, as amended.

The Executive Secretary to the Supreme Court shall serve as Executive Secretary to the Commission and shall receive all charges brought to the Commission and shall perform such other duties as may be assigned by the Commission. (1971, Ex. Sess., c. 154.)

§ 2.1-37.8. Compensation and expenses.—Each member of the Commission shall be allowed his necessary expenses for travel, board, and lodging incurred in the performance of his duties. The two judicial members shall not receive any compensation for their services, but the public member and the two lawyer members shall each receive compensation of fifty dollars per diem for each day of his attendance upon any meeting of the Commission. These and

all other necessary expenses of the Commission shall be paid by the Commonwealth. (1971, Ex. Sess., c. 154.)

ARTICLE 2.

Investigations and Hearings.

§ 2.1-37.9. Oaths; inspection of books and records; subpoenas.—In the conduct of investigations and formal hearings, the Commission may (a) administer oaths and affirmations; (b) order and otherwise provide for the inspection of books and records; and (c) issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, and other records or tangible evidence relevant to any such investigation or formal hearing.

The power to administer oaths and affirmations, to issue subpoenas, or to make orders for or concerning the inspection of books and records may be exercised by any member of the Commission, unless the Commission shall otherwise determine. (1971, Ex. Sess., c. 154.)

§ 2.1-37.10. Scope of process.—In any investigation or formal proceeding in any part of the State, any process issued pursuant to the provisions of § 2.1-37.9 shall be effective throughout the Commonwealth. (1971, Ex. Sess., c. 154.)

§ 2.1-37.11. Order compelling witness to attend and testify.—If any person refuses to attend or testify or produce any writings or things required by any such subpoena, the Commission may petition any court of record in the Commonwealth for an order compelling such person to attend and testify or produce the writings or things required by the subpoena before the Commission. The court shall order such person to appear before it at a specified time

and place and then and there show cause why he had not attended or testified or produced the writings or things as required. A copy of the order shall be served upon him. If it appears to the court that the subpoena was regularly issued, the court shall order such person to appear before the Commission at the time and place fixed in the order and testify or produce the required writings or things. Upon failure to obey the order, such person shall be dealt with by such court as for contempt of court.

All process in any such case may be served in the manner prescribed by law for service of process in civil actions. (1971, Ex. Sess., c. 154.)

§ 2.1-37.12. Depositions.—In any pending investigation or formal hearing, the Commission may order the deposition of a person residing within or without the State to be taken in such form and subject to such limitations as may be perscribed in the order. If the subject judge and counsel for the Commission do not stipulate as to the manner of taking the deposition, either the judge or counsel for the Commission may file in a trial court of record a petition entitled "In the Matter of Proceeding of Judicial Inquiry and Review Commission No. ..... (state number)" and stating generally, without identifying the judge, the nature of the pending matter, the name and residence of the person whose testimony is desired, and directions, if any, of the Commission, asking that an order be made requiri ; such person to appear and testify before a designated officer. Upon the filing of the petition, the court may make an order requiring such person to appear and testify. A subpoena for such deposition shall be issued by the clerk of the court and the deposition shall be taken and returned, in the manner perscribed by law for depositions in civil actions. Upon failure of the person named in the subpoena to appear and testify, he shall be dealt

with by such court as for contempt of court. If the deposition is that of a person residing or present within this State, the petition shall be filed in the court of record of the county or corporation in which such person resides or is present; otherwise in the Circuit Court of the city of Richmond. (1971, Ex. Sess., c. 154.)

§ 2.1-37.13. Confidentiality of papers and proceedings.—All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11, 2.1-37.12), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character. However, if the Commission shall find cause to believe that any witness under oath has willfully and intentionally testified falsely, the Commission may direct the chairman or one of its members to report such finding and the details leading thereto including any transcript thereof to the Commonwealth's attorney of the city or county where such act occurred for such disposition as to a charge of perjury as the Commonwealth may be advised. In any subsequent prosecution for perjury based thereon, the proceedings before the Commission relevant thereto shall lose their confidential character.

All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal, shall be kept in the confidential files of the Commission.

Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor. (1971, Ex. Sess., c. 154.)

§ 2.1-37.14. Privilege.—The filing of papers with and the giving of testimony before the Commission shall be privileged, except where such filing of papers or giving of testimony is motivated or accompanied by actual malice. No other publication of such papers or proceedings shall be privileged in any action for defamation except that (a) the record filed by the Commission with the Supreme Court, in support of a formal complaint filed therewith, continues to be privileged and (b) a writing which was privileged before its filing with the Commission does not lose such privilege by such filing. (1971, Ex. Sess., c. 154.)

§ 2.1-37.15. Witness fees; mileage.—Each witness, other than an officer or employee of the Commonwealth or a political subdivision thereof, or an officer or an employee of a court of this Commonwealth, shall receive for his attendance the same fees and all witnesses shall receive the same mileage allowed by law to a witness in civil cases. The amount shall be paid by the Commission from funds appropriated for the use of the Commission. (1971, Ex. Sess., c. 154.)

§ 2.1-37.16. Costs.—No award of costs shall be made in any proceeding before the Commission or the Supreme Court. (1971, Ex. Sess., c. 154.)

Article 3.

Cooperation of Public Officers and Agencies.

§ 2.1-37.17. Assistance and information.—State and local public bodies and departments, officers and employees thereof, and officials and all personnel of the courts of this Commonwealth shall cooperate with and give reasonable assistance and information to the Commission and any authorized representative thereof, in connection with any

investigations or proceedings within the jurisdiction of the Commission. (1971, Ex. Sess., c. 154.)

§ 2.1-37.18. Service of process; execution of orders.—It shall be the duty of the sheriffs and sergeants in the several counties, cities, and towns, upon request of the Commission or its authorized representative, to serve process and execute all lawful orders of the Commission or entered by the court at its request without costs therefor. (1971, Ex. Sess., c. 154.)

APPENDIX D

News Article of October 4, 1975, *The Virginian-Pilot*

(See Opposite) ☞

Possible Discipline

Hearing Held About Judge

By STEVE GOLDBERG

Virginian-Pilot Staff Writer

NORFOLK — A formal hearing concerning possible disciplinary action against Juvenile and Domestic Relations Court Judge H. Warrington (Spike) Sharp was held early last month.

The two-day hearing at Holiday Inn-Scope, conducted by members of the state Judicial Inquiry and Review Commission, apparently stemmed from charges of incompetence against the 55-year-old judge.

No formal complaint has been filed by the commission against Sharp, indicating either that the five-man panel found insufficient cause for action or that the case is still under review.

No commission member would say which is the case.

The review board is the state's most serious mechanism for policing judicial conduct. Its decision to press a formal complaint to the State Supreme Court could lead to retirement, censure, or removal from office.

Hearings and subsequent deliberation are conducted in strict secrecy since it is a misdemeanor to reveal commission actions.

Nevertheless, a number of local lawyers have confirmed privately since the first week of September that the hearing did take place. It is the first such investigation held here since the board was created in 1973, several said.

Sharp himself replied, "No comment" to a series of questions about the procedure.

Reno S. Harp III, deputy attorney general, headed the prosecution, sources said. Lawyer William L. Ward defended Sharp. The session stretched to two days. Otherwise, few details are known.

Most sources indicate general competence was the issue in question, although no one disclosed the specific charges. "It was more a melange of general complaints," said a lawyer subpoenaed to appear at the hearing.

Judge Sharp

Another source said that complaints from both citizens and lawyers were aired.

A typical response came from one assistant Commonwealth's attorney, identified as a witness at the hearing. "I can't even acknowledge that I know what you're talking about," he said. "And don't you dare tell anyone I've even talked to you."

All review board procedures are to be confidential unless charges (reviewed at a hearing) are held to be well-founded. If that happens, a formal complaint may be filed with the State Supreme Court and a hearing conducted in open court.

There are five commission members: Thomas L. Phillips of Lynchburg and Fred Bateman of Newport News, both lawyers; Judges Franklin Backus of Alexandria and Ernest W. Ballou of Roanoke; and Dr. George M. Modlin, retired chancellor of the University of Richmond. Modlin is chairman.

According to Harp, the commission has brought a recommendation to the State Supreme Court only once. That came in the case of Radford Circuit Court Judge Southall Jordan, who was subsequently censured for representing his son in General District Court on two separate traffic charges.

See Hearing, Page B4)

Hearing on Judge

Continued from Page B1

No commission member would confirm that action has been completed, or is still pending in the Sharp case. (The group's next regular meeting is scheduled for Oct. 17.)

Anyone — lawyer, fellow judge, or individual citizen — can lodge a complaint with the Inquiry and Review Commission. Conduct or mental and physical competence may be questioned. One lawyer noted that the board was originally viewed by many legislators as a mechanism for replacing judges who had become senile or otherwise impaired.

Commission member Bateman said that if a judge is determined to be disabled, he may retire with full benefits. If he is removed for incompetence, retirement and other benefits are lost.

Once a complaint is filed, an investigator (commission staff includes one lawyer and one nonlawyer) or a commission member is sent to explore the charge.

A Norfolk lawyer said he was visited in late June or early July by a special investigative officer "who asked a lot of questions (about Sharp)."

The man was later called as a witness.

If evidence is deemed sufficient, a formal hearing such as the one in Norfolk is held. According to Bateman, the commission holds hearings about 15 to 20 days each year. Perhaps half a dozen of those are considered formal.

When asked why only one case had ever been referred to the Supreme Court, Bateman said, "Several (judges) did resign . . . A number have retired or something like that."

Sharp, a Norfolk County native, became an associate judge in Juvenile and Domestic Relations Court in 1960, succeeding Alfred W. Whitehurst.

He was reappointed to six-year terms in 1967 and 1973, following unanimous votes of the Circuit Court judges.

Under judicial reform legislation passed in 1973, the procedure for selecting lower court judges was altered. The General Assembly assumed responsibility for their election.

Judges were given the option of continuing their term or going before the legislature for reappointment. Most judges, including Sharp, chose the latter route.

No complaints were logged against him during legislative hearings conducted then, one local legislator said. Sharp's present term will expire in January 1980.

APPENDIX E

Order of United States District Court for the Eastern District of Virginia

(See Opposite) ☞

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Nationwide Communications, Inc., et al,

Plaintiffs,

vs.

C.A. No. 77-0139-R

The Honorable Franklin P. Backus, et al,

Defendants.

FILED

MAR 15 1977

CLERK, U. S. DIST. COURT
RICHMOND, VA.

ORDER

For the reasons stated from the bench, and good cause having been shown, it is hereby ORDERED that the defendants Davis and Jones are temporarily enjoined from prosecuting plaintiffs, under Virginia Code Section 2.1-37.13. for broadcasting information relating to a pending investigation of the Virginia Judicial Inquiry and Review. This injunction shall expire within ten days of this date, unless sooner modified, extended or dissolved.

This injunction becomes effective upon the posting of bond in the amount of $500.00, which may be made by personal surety.

Enter:

Robert R. Merhige, Jr.

Judge

6:07 P.M.

March 15, 1977

A TRUE COPY-TESTE:
CLERK, U.S. DISTRICT COURT
BY: Angela P. Carmel.
DEPUTY CLERK

APPENDIX F

Notice of Appeal

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 76-0596

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Landmark Communications, Inc. ("Landmark"), hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Virginia entered on March 4, 1977 upholding the constitutionality of Va. Code § 2.1-37.13 and affirming the conviction of Landmark for violating Va. Code § 2.1-37.13.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ CONRAD M. SHUMADINE
Conrad M. Shumadine
David Y. Faggert
KAUFMAN, OBERNDORFER and SPAINHOUR
2030 Virginia National Bank Bldg.
Norfolk, Virginia 23510
Counsel for Appellant

Certificate of Service

I hereby certify, pursuant to Rule 33(1) of the Rules of the Supreme Court of the United States, that copies of the foregoing Notice of Appeal to the Supreme Court of the United States were served by mail the 15th day of April, 1977, upon the following:

Anthony F. Troy
Attorney General
James E. Kulp
Assistant Attorney General
900 Fidelity Building
230 East Main Street
Richmond, Virginia 23219

/s/ CONRAD M. SHUMADINE
Conrad M. Shumadine

Supreme Court, U. S.
FILED
JUN 4 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 1450

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

SUPPLEMENTAL BRIEF OF LANDMARK COMMUNICATIONS, INC.

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Attorneys for Appellant

June 3, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 1450

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

SUPPLEMENTAL BRIEF OF LANDMARK COMMUNICATIONS, INC.

This supplemental brief is submitted, pursuant to Rule 16(5) of this Court, on behalf of appellant Landmark Communications, Inc. ("Landmark"), for the purpose of calling the attention of the Court to the current status of certain litigation now under way in the federal courts in Virginia which bears upon the constitutionality of the statute in question on this appeal.

In our Jurisdictional Statement we adverted to the fact that only eight days after the decision of the Virginia Supreme Court in the instant case, Judge Robert R. Merhige, Jr., of the United States District Court for the Eastern District of Virginia, issued a temporary injunction restraining prosecution of a Virginia television station under the same section of Virginia law as that involved here (32a). That order subsequently expired under its own terms, since the litigation was not pressed.

As our Jurisdictional Statement (p. 10) also indicated, on March 31, 1977, Richmond Newspapers, Inc., the publisher of the *Richmond Times-Dispatch* and the *Richmond News Leader* was charged by the Commonwealth with violating Va. Code § 2.1-37.13. The United States District Court for the Eastern District of Virginia, on April 5, 1977, denied a temporary restraining order against the criminal prosecution. Judge D. Dortch Warriner at that time stated that although he believed the statute was unconstitutional, he could not hold the statute "was patently and flagrantly unconstitutional" in light of the decision of the Supreme Court of Virginia and thus could not enjoin a then pending criminal prosecution. *Norfolk Ledger-Star*, April 6, 1977, p. A8.

The events which have occurred since the filing of our Jurisdictional Statement on April 20, 1977 are as follows:

On April 29, 1977, Richmond Newspapers, Inc. was convicted of two violations of Va. Code § 2.1-37.13 and fined $1,000 for each violation.

On May 3, 1977, Judge Warriner, on application of Richmond Newspapers, Inc., entered a temporary restraining order lasting for ten days enjoining further criminal prosecutions against Richmond Newspapers, Inc. "under § 2.1-37.13 of the Code of Virginia, for the writing and for the publication of information relating to pending investigations of the Virginia Judicial Inquiry and Review Commission." (SB 1a).* In entering the order, Judge Warriner observed that the statute was one which prohibits publication of information that "a self-governing Commonwealth needs" and stated that "there is a grave question as to the constitutionality of this statute." (SB 5a).

---

* Reference to "SB——" are to the appropriate pages of the appendix to this Supplemental Brief.

On May 12, 1977, an order was entered extending the temporary restraining order until May 21, 1977. (SB 8a).

On May 20, 1977, a preliminary injunction was entered by Judge Warriner against prosecution of Richmond Newspapers, Inc., for any alleged violations of Va. Code § 2.1-37.13 during the pendency of the action. (SB 10a). In support of his order, Judge Warriner referred to:

> "... the loss to the citizens of Virginia of the opportunity of knowing what disciplinary actions are contemplated, what investigations are being made, what is being done about bad judges. They have a right to know, and a deprivation of that right is surely as damaging to the body politic of Virginia as the inconvenience that was found in the Maynard case to warrant Federal intervention there." (SB 20a-21a).

He further observed that:

> "Surely it is newsworthy that a judge is being investigated. Surely it's newsworthy that a judge is being disciplined by reprimand, informal or otherwise. That's newsworthy. And if the newspaper doesn't print that news, then it can be said that it is printing the opposite; it is saying the opposite. And in that sense, the newspaper is being forced by the State not only to say something it doesn't want to say but to say something that isn't true and thus is misleading the citizenry." (SB 21a-22a).

• • •

Thus, the current situation in Virginia is that the Supreme Court of Virginia has held the statute in question on this appeal to be constitutional; two separate federal judges have, subsequent to that ruling, enjoined prosecu-

tion under the statute; the injunction against prosecution of Richmond Newspapers, Inc. remains in effect. That injunction does not, however, refer to prosecution in the event of publication by any other newspaper.

We believe these events, reflecting conflicting views of the federal Constitution and presenting the risk of differing treatment for similar conduct on the part of the media, add still further support to the submission in our Jurisdictional Statement that this case is surely worthy of plenary consideration by this Court. We urge the Court to note probable jurisdiction and to set this case down for oral argument as promptly as is possible.

Respectfully submitted,

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Attorneys for Appellant

June 3, 1977

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APPENDICES

APPENDIX A

Order of May 3, 1977

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Civil Action No. 77-0237-R

RICHMOND NEWSPAPERS, INC.,

Plaintiff.

v.

AUBREY M. DAVIS, JR.,

Defendant.

ORDER

For the reasons stated from the bench, and in order to prevent irreparable damage to the plaintiff from threatened criminal prosecutions, as set forth fully in the plaintiff's verified Complaint, and good cause having been shown, it is hereby ORDERED that the defendant is temporarily enjoined from prosecuting the plaintiff, under § 2.1-37.13 of the Code of Virginia, for the writing and for the publication of information relating to pending investigations of the Virginia Judicial Inquiry and Review Commission. This injunction shall expire within ten days of this date, unless sooner modified, extended or dissolved.

Appendix A

This injunction becomes effective upon the posting of bond in the amount of $100.00 without surety.

ENTER:

3 May 1977

/s/ D. DORTCH WARRINER
U.S. District Judge

We ask for this.

.....
Counsel for Plaintiff

A
COPY
TESTE:
W. FARLEY POWERS, JR., CLERK

By: /s/ SAMUEL I. GOLIGHTLY, JR.
SAMUEL I. GOLIGHTLY, JR.
DEPUTY CLERK

FILED IN OPEN COURT
May 3, 1977
CLERK, U.S. DIST. COURT

APPENDIX B

Transcript of May 3, 1977

The Court: I think this is a difficult question. I can easily understand that view of the General Assembly that in order to encourage people to bring charges against judges that a degree of confidentiality is desirable.

And it is generally supposed that judges are extremely powerful individuals and that if you are going to complain about them that you had better be sure you got it straight and so forth. It is sort of like the proverb if you—I forgot exactly how it goes, but something, if you strike at a tyrant, strike to kill, not simply strike to injure him.

And so one might be fearful of making complaints against a judge unless he was absolutely certain that he could get that judge off the bench, particularly a lawyer who is required to practice before him. And no one is in much better position than a lawyer to know the problems that judges may have in even-handed administration of justice; even other judges don't often sit in and hear a case being tried.

And I think it is very true that a reasonably prudent lawyer would indeed hesitate to bring any charges against a judge unless he could be assured of confidentiality in the event his charges proved to be unfounded or in the event he is unable to convince a duly constituted tribunal that his charges are well-founded.

I also am mindful of some motives that may involve not embarrassing a judge with frivolous charges against him. That one doesn't strike me as having any force. But the other one does, for the good of the body politic that persons feel no undue restraint in bringing charges against judges.

Then you have the other side of the ledger; that is, that in a self-governing commonwealth, persons have a right

to know how their servants are behaving. And, of course, judges are the servants of the people, under the law. And to shield judges from public opinion, from criticism, both just and unjust; both accurate and inaccurate; both well thought out or surface; to shield judges from any type of criticism is to create sort of a special class of judges and say that they are above the right of the citizens to know ill of them.

Then you have, of course, the freedom of the press, and I am not sure whether that is a freedom which belongs to the fourth estate or whether it's a freedom which belongs to the people. And I am not sure it makes a whole lot of difference, because if you deprive the fourth estate of the freedom of press, you are depriving the people of their freedom to know, to hear, to be misled as well as to be led, to be misinformed as well as to be informed.

But these arguments about freedom of the press took place a number of years ago, 150 or so years ago. They continue to this day. But the fundamental question was decided with the adoption of the First Amendment to the Constitution. The fundamental question is that where one attempts to place any restriction upon the freedom of the press, that that one has an extremely heavy burden to carry through.

Now, today the defendant here has argued something with respect to the law, but I don't recall any argument about the reason that the Commonwealth has this law. I suppose that perhaps the reason supplied by the Court in its opinion is as good as any. And the Court accepts that that probably is one of the reasons. There are probably others maybe even more weighty than have occurred to me, but not weighty enough to overcome the Constitutional

requirement that we make no laws restricting freedom of the press.

Now, I don't agree with Mr. Justice Black in his absolutist theories of that. But we are not in the area of absolutism when we come to question whether a law which makes it a misdemeanor to publish what amounts to criticism of judges is in the absolutist area. It's not. It's far from it.

It's in precisely that area that a self-governing commonwealth needs to have information, must have information.

We don't have the case that we had here, what was it, a month ago. In that case, Richmond Newspapers, Inc., was in the midsts of a criminal prosecution. The Supreme Court of the United States has spoken, I think, very clearly on the point that we are to interfere in our primary duty to uphold the rights of citizens under the Federal Constitution. We are to interfere in carrying out that responsibility only where the statute is flagrantly and patently unconstitutional, where the prosecution is a form of harassment and entered into in bad faith and whatever the other criteria were that I gave at that time.

Here, there is no prosecution pending. The Federal Court is not reaching into the well of a State courtroom and saying stop. We're saying nothing to any judge or jury or commonwealth's attorney or grand jury or any other body that is legally constituted for the purpose of requiring adherence to the laws of the Commonwealth. We're merely saying for purposes of a temporary restraining order there is a grave question as to the constitutionality of this statute.

There is, if it's necessary to say so, and I'm not sure that there is, a reasonable likelihood that the plaintiff will prevail. The violation of First Amendment rights inherently is great and irreparable harm. There need be no showing,

so far as I know, that one is suffering some peculiar particular irreparable and great harm. It is self-evident that a denial of First Amendment rights, where it exists, constitutes irreparable harm.

I recognize Mr. Young's argument that a Court should with great caution interfere in a Federal system with the requirements of obedience to State laws. I recognize that Mr. Davis is not being arbitrary and capricious when he requires obedience to the State laws. Indeed he is simply doing his duty. His duty is to prosecute those who violate the law.

Richmond Newspapers admits that they contemplate the violation of the law. I see an immediate threat of prosecution. I see no question but what the prosecution would be successful. And I see irreparable harm to Richmond Newspapers, Incorporated, in carrying out its duty to print the truth or whatever it conceives to be the truth and of the right of the people of Virginia to read at least Richmond Newspapers' version of the truth; because I don't know that there is any obligation that it be true.

I am going to issue the temporary restraining order. I do it with caution. I have considered the briefs that the parties have filed. I have attempted to study the law. I just lately read the Maynard case. There are some distinguishing features, of course, between Maynard and this case. But the distinguishing features don't apply, as I see it, to the principles involved. They apply only to the guise under which that case arose being somewhat different from the guise under which this case arose, but it seems to me the principles are the same.

The Court will require that bond be posted in the amount of $100, and the defendant will be enjoined from prosecuting the plaintiffs for disclosing matters pending before

the Virginia Judicial Inquiry and Review Commission in the ordinary course of its duties as a newspaper.

Counsel may prepare a draft order or injunction carrying out the terms of what the Court has indicated from the bench that it intends to do. And I see Mr. Wellford, ever confident of his success here today, has already prepared one. Is that correct, Mr. Wellford?

Mr. Wellford: I have a sketch here, Your Honor.

The Court: Has it been submitted to opposing counsel?

Mr. Wellford: Yes, sir.

The Court: Does opposing counsel have any remarks as to form?

Mr. Young: Yes, sir. I understand that it is to expire in 10 days.

The Court: So far as I know, that's the limit that the law permits.

Mr. Young: I would like to request that this be made and consolidated to preliminary injunction • • •

APPENDIX C

Order of May 12, 1977

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
Civil Action No. 77-0237-R

RICHMOND NEWSPAPERS, INC.,

Plaintiff,

v.

AUBREY M. DAVIS, JR.,

Defendant.

ORDER EXTENDING TEMPORARY RESTRAINING ORDER

On motion of plaintiff, by counsel, and good cause having been shown, it is hereby ORDERED that the Order temporarily enjoining defendant from prosecuting plaintiff, previously entered by this Court, be, and it hereby is, continued in full force and effect until May 21, 1977, unless sooner modified, extended or dissolved.

ENTER:

12 May 1977

/s/ D. DORTCH WARRINER
U.S. District Judge

Appendix C

We ask for this:

/s/

.....
Of Counsel for Plaintiff

A
COPY
TESTE:
W. FARLEY POWERS, JR., CLERK

By: /s/ SAMUEL I. GOLIGHTLY, JR.
SAMUEL I. GOLIGHTLY, JR.
DEPUTY CLERK

FILED IN OPEN COURT
May 12, 1977
CLERK, U.S. DIST. COURT

APPENDIX D

Order of May 20, 1977

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
Civil Action No. 77-0237-R

RICHMOND NEWSPAPERS, INC.,
Plaintiff,

v.

AUBREY M. DAVIS, JR.,
Defendant.

ORDER

This cause came on to be heard on plaintiff's motion for a preliminary injunction; and the Court having considered the verified complaint, the stipulation of facts entered into by both parties, the exhibits admitted into evidence, the briefs of both parties, and having heard the arguments of counsel, and for the reasons, including findings of fact and conclusions of law, stated from the bench by the Court, it is

ORDERED that defendant be and he hereby is restrained and enjoined, pending the determination of this action or until further order of this Court, from prosecuting plaintiff, its agents, servants, employees and counsel, for any alleged violation of § 2.1-37.13 of the Code of Virginia.

Appendix D

This injunction becomes effective upon the posting of bond in the amount of $100.00 without surety.

ENTER:

20 May 1977

/s/ D. DORTCH WARRINER
U.S. District Judge

A
COPY
TESTE:
W. FARLEY POWERS, JR., CLERK

By: /s/ SAMUEL I. GOLIGHTLY, JR.
SAMUEL I. GOLIGHTLY, JR.
DEPUTY CLERK

FILED
May 20, 1977
CLERK, U.S. DIST. COURT
RICHMOND, VA.

APPENDIX E

Transcript of May 20, 1977

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Civil Action No. 77-0237-R

RICHMOND NEWSPAPERS, INC.,
a Virginia corporation,

Plaintiff,

vs.

AUBREY M. DAVIS, JR., individually and in his official capacity as the Commonwealth's Attorney for the City of Richmond,

Defendant.

EXCERPTS OF PROCEEDINGS

Richmond, Virginia

May 20, 1977

Before:

HONORABLE D. DORTCH WARRINER,
United States District Judge

Appendix E

Appearances:

CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL
Counsel for Plaintiff

By: ALEXANDER WELLFORD, ESQUIRE,
JAMES W. TREDWAY, ESQUIRE, and
LESLIE W. MULLINS, ESQUIRE

ANTHONY F. TROY, ESQUIRE,
Attorney General of Virginia
Counsel for Defendant

By: D. PATRICK LACY, ESQUIRE, and
JOHN HARDIN YOUNG, ESQUIRE

Reported by:

Donald E. Brayboy,
Official Court Reporter

The Court: One of the most interesting aspects about this job is that nothing is ever simple. And if that were not so, I don't suppose it would be such a good job.

The Court has re-read *Juidice* and has re-read *Maynard* in light of the arguments that have been made.

Of course, the Court finds as facts all the facts set forth in the stipulation. The Court finds as a fact that with respect to the matter before the Court, there are no pending proceedings in the State court. I think that's agreed to in the stipulation.

The Court further finds as a fact that criminal prosecution of the plaintiff is imminent, both for past publications or divulgings, in the words of the statute, and for those that are contemplated in the future. The Court finds that

any such prosecution will be successful, regardless of the assertions of First Amendment rights by the plaintiff, then defendant, in such prosecution, and I don't think that there is any dispute about that.

With respect to irreparable harm, the Court does not find that there would be irreparable harm in the matter of the imposition of a fine, a thousand dollars, which is the maximum, nor indeed with the reasonably to be anticipated cumulative effect of thousand dollar fines. If the Court were to find that the fines were being imposed, $1,000 a day for each publication, maybe, since there are two newspapers, $2,000 a day, one for the News Leader, one for the Times Dispatch, then we might be entering the area of harassment for bad faith, and it would be an entirely different situation anyhow.

But I don't think we are faced with that. I don't think we have an unreasonable Commonwealth's Attorney or Attorney General. They have a duty, and that duty is to uphold the laws of the Commonwealth. We're not in the area of bad faith. And the irreparable harm does not lie from the existence of the probability of a fine. The irreparable harm lies in the fact that the Commonwealth of Virginia is a self-governing Commonwealth. As such, its citizenry has a duty and a right to know and to be informed with respect to their government. That's certainly far from being a profound statement, but it's one that I think is universally accepted, that they have a right and duty to be informed as to the affairs of their government, particularly where the matter involves the competence and honesty of their magistrates, their judges.

Now, this doesn't speak at all to the right of the Commonwealth to maintain confidentiality over appropriate

matters. That matter is not before the Court, and the Court makes no finding or ruling with respect to that.

Now, *Juidice* v. *Vail*, and *Wooley* v. *Maynard* were handed down by the Supreme Court within a month of each other. *Juidice* v. *Vail* was decided on the 22nd of March, 1977. *Wooley* v. *Maynard* was decided on the 20th of April, 1977. And neither mentions the other. It would have been helpful, perhaps, in *Wooley* v. *Maynard* had they distinguished *Juidice* v. *Vail*. But it may be that the Supreme Court felt no distinction was needed.

At the very beginning of *Juidice* v. *Vail*, the Supreme Court discussed jurisdiction. And they used the phrase "standing to sue." I suppose that there are distinctions between "standing to sue" and "jurisdiction."

But with respect to abstention, with respect to *Huffman* v. *Pursue*, there is a remarkable similarity between the two. And the Court pointed out in *Juidice* v. *Vail* that what we had there was a *Younger* case, a *Huffman* v. *Pursue* case. We had a pending State proceeding.

The plaintiff—I believe it was Ward who was the one that was finally admitted as a plaintiff—Ward was the subject of pending State proceedings at the time.

Reading from page 383 of the Lawyers' Edition Report, 51 Lawyers' Edition, 2d, 376:

> "Appellees Ward and Rabasco do have standing, since they are subject to pending proceedings in the State courts."

Since their standing is predicated on the existence of a pending and not merely a threatened proceeding, we deal with Appellant Younger's contentions. Their standing was based upon the fact that a threat was presented to them

in that pending proceeding which could affect their liberty. There was imminence of danger, just as it is in this case; the Court has found it to be in this case.

But when the question of intervention arises, it arises under the situation of a pending proceeding, not of a non-pending proceeding, such as we have in this case.

Juidice v. *Vail* is an example of the legal situation that this Court was recently confronted with in the matter that was discontinued by the parties when the Richmond Newspapers sought an injunction against the pending proceeding in the Richmond Circuit Court. And the Court, this Court, I think correctly, refused to issue an injunction because criminal proceedings were in progress at that time.

The same thing was true in *Juidice* v. *Vail*. Though standing existed, the Court's discretion to issue an injunction in *Juidice* v. *Vail* was measured against the need, the propriety, the right in a Federal system, the duty in a Federal system for a Federal court to issue an injunction with respect to pending criminal proceedings.

That, I think, is *Juidice* v. *Vail*. That, I think, shows that *Juidice* v. *Vail* is significant only insofar as it extends *Younger* to contempt proceedings. As I recollect, *Younger* was a criminal proceeding. *Huffman* was a civil quasi-criminal proceeding. *Juidice* is now a contempt proceeding. And in all of those, where there is a pending State proceeding, this Court is told, the Federal Courts are told, "Do not enjoin."

And, surely, I have no quarrel with that. But that's not the case the Court has before it. The Court has before it a case which does *not* involve a pending judicial proceeding.

And perhaps I should call attention to the fact that those plaintiffs in *Juidice* v. *Vail* who had completed the contempt proceeding and had paid their fine and had gotten out of jail were denied standing to sue. And, significantly, the Court said they did not allege the imminence of continued contempt proceedings against them.

The Court went on to note that Mr. Vail, who had a proceeding against him on account of the fact that he owed 500 and some odd dollars, $536, I think, had paid $250 against that judgment, that being a $250 fine for contempt, which was applied against the judgment, and thus still had some 280 some dollars against him for which he was subject to proceedings on a contempt all over again, didn't allege that such proceedings were imminent, and there was nothing in the record to indicate that they were imminent, and the District Court had not found that they were imminent.

Thus, again, the *Juidice* case is not the case we have before us because the Court has found on the basis of this case, the basis of competent evidence and stipulation, that criminal prosecution is imminent. Indeed, the Commonwealth has never denied that if the law is violated, they will prosecute. They have never denied that in the absence of the temporary restraining order they might well have prosecuted for the slip-up or whatever it was of early May.

So then we go to *Wooley* v. *Maynard*, which is a case, I think, in many respects similar to this, though, as counsel observed, both counsel for plaintiff and counsel for defendant, in response to questions from the Court, the cases may be distinguished.

In the *Wooley* case, the Chief Justice held that the principles of equitable restraint enunciated in *Younger*, the principles of comity, the principles of abstention, what-

Appendix E

ever word may be used, do not preclude a District Court from exercising jurisdiction.

And now I am going to refer to the syllabus in Law Week.

> "A. When a genuine threat of State prosecution exists"—which the Court finds exists here—"a litigant is entitled to resort to a Federal forum to seek redress for an alleged deprivation of Federal rights. And aside from *Younger* principles, they may seek such redress under Section 42, U.S.C. 1983, when the relief sought is wholely prospective, i.e., to preclude further prosecution under a statute alleged to violate Constitutional rights. Failure to seek State appellate review of criminal convictions does not bar relief in Federal Court."

Now, we have, I think, the obverse of that last sentence. Here we have the exercise by the plaintiff of its right to seek appellate review in the State courts. But there is no equitable principle that I can see that would say that one should be in a better position to seek Federal relief because he refused to appeal a State conviction over one who does appeal. One who continues to exercise his rights under State law ought not thereby to be deprived of resort to a Federal Court over one who abandons his rights under the State law. I see no equitable principle. I know of no legal principle that says that these two situations should be distinguished.

And indeed we have not before us an appeal from the conviction in the Circuit Court of Richmond in any event. We have before us resort to the Federal Court because of the imminence of other convictions, just as Mr. Maynard had.

Appendix E

> "C. The threat of repeated prosecutions in the future against both appellees"—in that case, the husband and the wife—"and the effect of such continuing threat on their ability to perform the ordinary tasks of life that require an automobile are sufficient to justify injunctive relief and, hence, the District Court was not limited to granting declaratory relief."

Well, in Maynard, Mr. Maynard's and Mrs. Maynard's ability to function as citizens in the State of New Hampshire was severely abridged if they didn't have a right to drive their automobile.

I do not agree with counsel's argument that they could move to Connecticut. Imagine someone saying to a Virginian that you can move to North Carolina. If that's the only way we can protect our Constitutional rights, then—well, I won't go any further on that.

The hampering that would be commensurate with the hampering that Mr. Maynard was subject to, the threat to his ability to perform the ordinary tasks of daily life is, I think, the prohibition upon the citizenry of the State from knowing the workings of their government.

Again, I want to emphasize that I don't have before me the right of the Commonwealth to require its employees, its servants, its agents to take oaths to maintain confidentiality. That is not before me. I make no ruling on that.

But the example that was mentioned in argument of a newspaper reporting the gross conduct of a judge on the bench and being unable to report to the citizenry that something was indeed being done about that gross conduct strikes at the heart of the citizenry's respect for the courts.

Appendix E

If it be known falsely by the citizenry that judges with impunity may conduct themselves arrogantly, tyranically, shamefully on the bench and that's reported in the press, and then a great silence follows, no indication of any reprisals, no indication of any inquiry, no indication that anyone even cares, then that set of facts alone would put the Judiciary into disrepute.

I am mindful of the argument that Mr. Rehnquist made in his dissent, that one is not publicizing "live free or die" when one has it on his license plate when everyone knows that you're required by law to have it on your license plate; and it doesn't indicate in any way your agreement or assent to that.

And if one knows that the newspapers are required by law not to print information about investigations into judges' improprieties, then one would not reasonably believe that the mere fact that they are not reading about it indicates that nothing is being done about it because they know that whatever is being done about it, if anything, cannot be publicized.

That is a good argument but it presumes that everyone knows the law, among other things, and that is a presumption that we are not able to indulge.

I think everyone does know that automobiles have to have license plates on them. But I am far from sure that everyone knows that in the Commonwealth of Virginia newspapers can't print the truth about disciplinary actions against judges. As a matter of fact, I doubt if many people would believe it if it was presented baldly to them like that. And, yet, that is, baldly, what we have.

So I find that the inconvenience to Mr. Maynard and Mrs. Maynard is matched, perhaps more than matched, by the loss to the citizens of Virginia of the opportunity

Appendix E

of knowing what disciplinary actions are contemplated, what investigations are being made, what is being done about bad judges. They have a right to know, and a deprivation of that right is surely as damaging to the body politic of Virginia as the inconvenience that was found in the Maynard case to warrant Federal intervention there.

The second aspect of the Maynard case that struck the majority of the Court as calling for intervention was the problem of forced propagandizing by Mr. Maynard. It was held by the Court that Mr. Maynard was, against his will, against his conscience, against his sense of ethics, against his religious belief, being required to propagandize that it is better to die than to live as a slave. And though I have no problem with that ideological maxim at all, Mr. Maynard did. And the Court, the Supreme Court of the United States, said that Mr. Maynard against his will was being required to espouse that cause.

I don't think we have as close a parallel there as we do in the first instance; that is, of the deprivation. It may be argued that where the newspaper fails to tell the truth; that is, fails to say anything, it is saying that there is no news in this area.

If a newspaper has an obligation to print all the news that's fit to print and it doesn't print certain news, then that is saying, I suppose, that that's because there is no news in that category of newsworthy events.

Surely it is newsworthy that a judge is being investigated. Surely it's newsworthy that a judge is being disciplined by reprimand, informal or otherwise. That's newsworthy. And if the newspaper doesn't print that news, then it can be said that it is printing the opposite; it is saying the opposite. And in that sense, the newspaper is being forced by the State not only to say something it

doesn't want to say but to say something that isn't true and thus is misleading the citizenry.

Again, I call attention to the Rehnquist dissent, which says that that is not a valid argument when the people know that the newspaper can't print the truth. But I submit that a knowledge of that law is not nearly as universal as the knowledge that you can't operate an automobile without a license tag.

Thus, I conclude under the law that we have a *Wooley* v. *Maynard* case; that considering the far greater implications of the First Amendment right of people to know about their judiciary over Mr. Maynard's individual right to cover up his sign, that we have before us all of the imperatives that the Chief Justice saw in Maynard's situation and more.

The issues in Maynard could be on the surface laughed at. It could be said that, "Some nut up in New Hampshire wants to put adhesive tape on his sign and he carries it all the way to the Supreme Court of the United States; isn't that ridiculous?" And yet I think that a reading of the opinion in the Maynard case would show that the issue is far more than putting adhesive tape over a license plate. The issue is the issue of the reach and depths of our First Amendment dedication to free speech.

Accordingly, I am going to issue a preliminary injunction that will continue until further order of the Court or until a final hearing on the merits, if counsel deem such a final hearing necessary. I am not aware in my recitation of findings of any disputed fact. I believe that all of the findings that I made are not only undisputed but are agreed to.

However, I think counsel might well re-examine the file and re-examine the Court's opinion in the case to be certain that that is so; and, if it is, a submission that the preliminary injunction should be made final so that you may proceed with a full record to the Court of Appeals. That would be in order.

The injunction, of course, would be against the prosecution or threat of prosecution of Richmond Newspapers, Incorporated, any of its agents, servants, employees or counsel for any alleged violations of Code of Virginia, Section 2.1-37.13 during the pendency of the injunction.

Before the injunction will be in force and effect, the plaintiff will have to post a bond in the amount of $100 or continue in effect the bond posted at the time of the entering of the temporary restraining order.

Is there any other matter the Court needs to attend to at this time?

Mr. Wellford: No, Your Honor.

Mr. Troy: No, Your Honor.

(Whereupon, at 12:34 p.m., the Court adjourned.)

Court Reporter's Certificate

I, Donald E. Brayboy, RPR, official court reporter for the United States District Court, Eastern District of Virginia, Richmond Division, do hereby certify that the foregoing transcript of excerpts of proceedings, numbering pages 1 through 17, inclusive, is a true, correct and complete transcript of excerpts of proceedings before The Honorable D. Dortch Warriner, United States District Judge, and heard May 20, 1977, at Richmond, Virginia.

Given under my hand this 23rd day of May 1977.

/s/ Donald E. Brayboy
Official Court Reporter

Supreme Court, U. S.
FILED
JUL 28 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT FILED APRIL 20, 1977
PROBABLE JURISDICTION NOTED JUNE 13, 1977

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Relevant Docket Entries

IN THE

CIRCUIT COURT OF THE CITY OF NORFOLK

No. M34-76

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

LANDMARK COMMUNICATIONS, INC.,

Defendant.

DATE	PROCEEDINGS
1975	
November 5	Indictment against Landmark
December 10	Motion to dismiss the indictment
December 10	Stipulation of Evidence
December 10	Testimony adduced and proceedings had before the Honorable Alfred W. Whitehurst. Commonwealth's Trial Exhibit C-3 accepted into evidence. Transcript taken.
December 10	Order denying Landmark's motion and taking the matter under advisement
1976	
January 15	Order finding Landmark guilty as charged
January 27	Letter from counsel for the defendant to Judge Whitehurst, noting objections and exceptions of Landmark that should have been made a part of the Final Order
January 27	Notice of Appeal and Assignments of Error

Relevant Docket Entries

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

No. 76-0596

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

DATE	PROCEEDINGS
1977	
March 4	Opinion of the Supreme Court of Virginia.

Indictment Against Landmark, dated November 5, 1975

Misdemeanor

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

[Caption Omitted in Printing]

November 5, 1975
Date

The Grand Jury charges that: on or about October 4, 1975, in the City of Norfolk, Landmark Communications, Inc., a Virginia Corporation, did unlawfully divulge the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing by the Judicial Inquiry and Review Commission.

Va. Code Sec. 2.1-37.13, 18.2-12, 18.2-11

Witness: Sgt. L. E. Miller

(√) A True Bill
( ) Not A True Bill

/s/ G. M. Bacon, Jr.
(Foreman of Grand Jury)

[Attestation Omitted in Printing]

Motion to Dismiss the Indictment, filed December 10, 1975

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

[Caption Omitted in Printing]

Defendant, by counsel, hereby moves this Court to dismiss the indictment against Defendant under Section 2.1-37.13 of the Code of Virginia of 1950, as amended, for unlawfully divulging the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing by the Judicial Inquiry and Review Commission. As grounds therefor, Defendant alleges:

1. Section 2.1-37.13 is a penal statute and as such is construed strictly against the state.

2. The term divulge, as used in Section 2.1-37.13, does not extend to the publication of information concerning an investigation by the Commission after such information has already been made public.

3. Defendant published the identity of said Judge after such information had already been made public.

4. Defendant did not divulge confidential information concerning an investigation by the Commission within the meaning of the term divulge in Section 2.1-37.13.

5. The freedoms under the First Amendment of the Constitution of the United States occupy a preferred position and the State has the burden of proving the constitutionality of legislation abridging such rights.

Motion to Dismiss the Indictment, filed December 10, 1975

6. If the term divulge, as used in Section 2.1-37.13, is held to extend to the publication by Defendant of already public information such Section is unconstitutional in its application to Defendant as it abridges Defendant's First Amendment right of Freedom of the Press.

WHEREFORE, Defendant prays that the indictment be dismissed because the publication of already public information concerning an investigation by the Judicial Inquiry and Review Commission does not violate Section 2.1-37.13, or, in the alternative, that Section 2.1-37.13 is unconstitutional in its application to Defendant as it abridges Defendant's First Amendment right of Freedom of the Press.

Stipulation of Evidence, filed December 10, 1975

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

[Caption Omitted in Printing]

The Commonwealth and the defendant, by counsel, stipulate the following as evidence in this case:

1. That the defendant is a Virginia corporation which publishes a newspaper, The Virginian-Pilot, from its registered office at 150 West Brambleton Avenue, Norfolk, Virginia.

2. That on or about October 4, 1975, the defendant published its newspaper, The Virginian-Pilot, a copy of which is hereby made a part of the evidence in this case.

3. That prior to the above publication, the Judicial Inquiry and Review Commission had investigated charges and held hearings arising out of the present term of office of a Judge of a Court not of record, who was identified in an article in the above mentioned newspaper published under date of October 4, 1975.

4. That at the time of the publication of the said newspaper and article, the said Judicial Inquiry and Review Commission had not filed a formal complaint with the Supreme Court.

[1]

Transcript of Proceedings held on December 10, 1975

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

[Caption Omitted in Printing]

Stenographic transcript of the testimony adduced and proceedings had upon the trial of the above-entitled case in said Court on December 10, 1975, at 10:50 a.m., before the Honorable Alfred W. Whitehurst, Judge.

APPEARANCES:

Mr. Joseph H. Campbell appearing on behalf of the Commonwealth

Messrs. Kaufman, Oberndorfer & Spainhour
By: Mr. Conrad M. Shumadine and Mr. Glenn Hampton appearing on behalf of Landmark Communications, Incorporated

Mr. John O. Wynne appearing on behalf of Landmark Communications, Incorporated.

[Page 2 (Index) Omitted in Printing]

[3] The Clerk: Who is present for Landmark?

Mr. Shumadine: Conrad Shumadine and with me is Mr. Glenn Hampton.

The Clerk: Landmark stands indicted as follows: Virginia, in the Circuit Court of the City of Norfolk on indictment for Divulging Identification of Judge Subject of Investigation and Hearing of Judicial Inquiry and Review Commission.

The Grand Jury charges that on or about October 4, 1975, in the City of Norfolk, Landmark Communications, Incorporated, a Virginia Corporation, did unlawfully divulge the identification of a Judge of a Court not of Record, which said Judge was the subject of an investigation and hearing before the Judicial Inquiry and Review Commission in violation of Virginia Code Section 2.1-37.13, 18.2-12, and 18.2-11.

Mr. Shumadine: Not guilty, Your Honor.

The Court: All right.

[4] The Clerk: All witnesses who will testify in the case, please stand and raise your hand and be sworn.

(Whereupon all witnesses were duly sworn.)

Mr. Campbell: The Commonwealth waives an opening statement except to say that the evidence by the Commonwealth will come under stipulation.

LANDMARK'S OPENING STATEMENT

The Court: All right.

Mr. Shumadine: May it please the Court, I would like to file a motion to dismiss the indictment which has previously been filed with Mr. Campbell and I think it would be appropriate to argue motions more fully after the Commonwealth has presented its evidence by stipulation.

The Court: All right.

Mr. Shumadine: I would like to make a very brief opening statement just to set down the issues. I am not going to try to argue substantially the law. We can do that after the Commonwealth has its evidence in, but I would like to make a few brief distinctions.

First, we're not talking here today about Landmark's right to get information. This is not [5] an access case.

We are not charged as far as we know with improperly obtaining the information. I believe the evidence will show the information was freely given to a reporter or reporters. Therefore, the question of access of a reporter to otherwise confidential information is not presented.

We are also not dealing with the question in this proceeding as to whether the statute could be unconstitutional if applied to the participants of the Judicial Inquiry and Review Commission. So far as the evidence will show, no one from Landmark Communications was subpoenaed to appear before the Judicial Inquiry and Review Commission and they did not participate.

A different issue is presented as to whether the participants can be bound not to divulge and whether Landmark can be bound not to divulge and we think these are distinctions for the Court to realize in hearing the evidence.

Now, with that in mind, we are going to waive any other opening statement and reserve our argument until the Commonwealth has commented itself.

We have filed a brief. Has the Court received a copy?

The Court: Yes, sir.

[6] Mr. Shumadine: Thank you.

Mr. Campbell: I would like to offer into evidence first the charter and articles of amendment of Landmark Communications, Incorporated, and the last annual report of February 14, 1975, and a stipulated item of evidence which is a copy of the Virginian-Pilot made on October 4th, 1975, the article in question being on page B1.

I'll read to the Court the stipulation of evidence agreed upon by the Commonwealth in defense. "The Commonwealth and the Defendant by counsel, stipulate the following as evidence in this case. One is that the Defendant

is a Virginia corporation published as a newspaper, the Virginian-Pilot from its registered office in Norfolk, Virginia.

Two, that on or about October 4, 1975, the Defendant published the Pilot which is a part of the evidence in this case.

Three—prior to the above publication the Judicial Inquiry and Review Commission had investigated—held hearings on and arising out of the present term of a Court Judge of a Court not of Record, identified in an article in a newspaper on October 4, 1975; that the said newspaper and article said the Judicial Inquiry and Review Commission had [7] not filed a formal complaint with the Supreme Court."

The Court: These will be C-1 through C-4. Is that the Commonwealth's evidence?

Mr. Campbell: That is the evidence of the Commonwealth and we rest.

(Whereupon the aforementioned Charter and Articles of Amendment, newspaper and article were marked as Complainant's Exhibit Number 1 through 4 and received in evidence.)

[Landmark's Argument on the Motion to Dismiss and Strike]

Mr. Shumadine: May it please the Court, Landmark Communications moves that the indictment be dismissed on the ground that it's the burden of the Commonwealth to prove the crime alleged with particularity and with such evidence on the basis that the statute, properly interpreted, does not include newspaper publication.

It's directed solely against the participants at the hearing and does not extend to the publication of newspapers,

followed with the basis that if the statute extends to newspaper publications, the statute is clearly unconstitutional on the First Amendment of the Constitution of the United States and of the Constitution of Virginia.

If is please the Court, I would like to go over the points in some length because I do feel [8] this is a case involving issues of grave public importance. If I may, I think I would like to go over the arguments in the order they have been presented in our brief and I would like to deal with Mr. Campbell's proof after going over the brief.

I would, once again re-emphasizing we're not talking about a participant and not talking about access, much of Mr. Campbell's brief seems to be dealing with access questions and participants. I think the first thing that becomes obvious in looking at the statute is that it nowhere refers to the word "publication." Also, nowhere in the statute is the term "newspaper" mentioned.

If the General Assembly intended to make this statute apply to newpaper publications, it would have written "newspaper publications" right in the statute clearly and unequivocably and they would have known it applied to them and realized this was a prohibition applied against newspapers. It's just not there.

The word Mr. Campbell says applies to newspapers is the word "divulge." We pointed out in the memorandum that the word "divulge" would encompass only the first statement, the first revelation, and it does not go on a never-ending circle to subsequent [9] revelations.

Now, I would like the Court's attention to the definition on page 10 in the memoranda and from Merriam Webster's Third International Dictionary, "To make known; a secret made known which has been previously unknown; which is the first act of the publication."

We have previously pointed out that in the Federal Wiretap Statutes the Courts have been called upon to define the meaning of the word "divulge," that the clear definition is that only the initial party who both intercepted the information and passed it on is subject to punishment under that.

It's plain that "divulge" would only contemplate the original publication. It was only directed at the participants. This argument is further bolstered by the fact that the statute becomes almost absurd if you apply the word to an ever-widening circle. We used an example. What if a participant told his wife? His wife mentioned it to the bridge group. Each of the members of the bridge group mentioned it to their husbands. They mentioned it again. I cannot conceive that the Commonwealth of Virginia intended that every person who passed that information on would be guilty of a criminal [10] sanction. That is not the meaning of the statute. It would not apply to anyone but the participants.

To apply a statute so that it incorporates an ever-widening circle of individuals who don't have any knowledge of their committing a crime is to destroy the rights of the individual. If you take somebody who read the article and told it to his wife before she read it, they would be guilty of a crime because they would continue to divulge it? It's obvious that this statute was not directed to newspapers. It doesn't have the word "newspaper" in it and it wasn't intended to deal with newspapers, but where the participants are concerned, it's designed to prohibit the original evidence. Once the evidence was made public freely, then to publish it—everyone had their rights of speech.

We would emphasize to the Court that as I think we have cited numerous authorities for a thing that if there is any ambiguity, it's construed against the statute. It is at best ambiguous. I would respectfully suggest to the Court that it's rather plain in its meaning. It's only to the original utterance and not an application to any other publication.

The reason the General Assembly did not apply the statute beyond the original utterance was [11] plain—they wanted to avoid the Constitutional question. They didn't want to make it fly in the teeth of the United States Constitution.

Now, moving on from that point, we would like to then move into the constitutional arguments. We would like at the outset to note that what is being dealt with in this case is nothing more than a publication—publication of an article which mentions the Judge's name and which mentions the fact he was under investigation. So far as we know, each of the charges in the article is absolutely 100 percent true and so far as we know, the article was not written in connection with any pending case.

The hearing of the Review Commission had been completed and as far as the evidence will show, it had been completed some time before. So we have here today an attempt to punish a newspaper for publishing the truth some months after an investigation when, as far as the evidence shows today, there was no pending cases to be affected.

Now I would like to begin by noting as we have noted in the brief that the rights of the press and the Free Press portion of the First Amendment—do they not mean that the press has the obligation to criticize? In a speech on November 2nd, 1974, at Yale Law School [12] Convoca-

tion, Mr. Justice Stewart spoke about the press and he pointed out that the free press portion was more than free speech; that if free press meant no more than free speech, it would be no more than a redundancy. But it was a protection for the press and it was a private business and given explicit protection and it was so that it could criticize the other three branches of government.

The Supreme Court has expressed that it's not the press' mere right to criticize, but the press has a solemn duty to bear upon each of the other branches of government, including the judiciary.

Now, we would then go on to note as we noted in the third portion of our brief that in order to restrict the rights of the press, it's necessary for the State to come forward with evidence to show that the statute meets some legitimate and some protected governmental purpose. While we recognize that normally a statute is presumed to be Constitutional, that presumption falls in the face of the First Amendment.

"The Supreme Court—" and we're quoting from page 20, "has noted that there is a preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the [13] First Amendment."

The Supreme Court in *Wilson* v. *Moore*, Federal Supplement 635, 638, 639—"In cases involving state action affecting fundamental rights arising out of the First Amendment, the State has the burden of establishing a compelling state interest in order to justify any infringement."

"In order to justify any infringement—" and the cases go on. And the case in a Virginia Federal Court which is quoted on page 22, *Walker* v. *Dillard*—"Since the legislative act challenged here is allegedly in violation of a First

Amendment guarantee, the presumption is against the validity of the statute."

We would point out that the Commonwealth has failed to produce any evidence to show that the State has a legitimate interest in secrecy in this case. He's speculating there might be some danger. There is no evidence against this Defendant to show there is any legitimately protected government interest. All we have here is a speculative argument in a brief. There is no evidence that the Judge will be influenced or that any pending case will be affected or any danger and certainly not a danger of a constitutional magnitude and we're going [14] to come back to that again and talk about specific cases concerning the judiciary. I'm not going to go through all the pages 22 through 24 because I think the law is so well settled, there's no need to go through them.

In order to establish that the statute is constitutional, not only do they have to show a legitimate interest to speculate, but to have clear and compelling evidence of a legitimate State interest involved, and there is not a shred of evidence in this case to show any State interest is affected or any damage done to anyone. I think it's plain such evidence is not available.

Now, to go on, Your Honor, the Supreme Court has recognized that in order to inhibit the press there must be evidence presented of a clear and present danger which is both imminent and immediate and we have no such evidence here.

I think that the three cases probably most closely related in point are cited on page 26; *Bridges* v. *California* and *Craig* v. *Harney*. Each case involves the attempted punishment of a newspaper for publishing editorials or articles highly critical, even vituperatively

critical, of Judges and the two cases are similar because as the legislature has [15] the right to declare acts prohibited by statute, so the Courts have the obvious right recognized throughout Common Law to punish for contempt if there is any intervention in the fair administration of justice and the contempt right has been given the broadest possible interpretation.

We have three cases which dealt with the issue and in each of the cases, the United States Supreme Court has held in each situation, much more revealing than the cause here before us that a punishment for publication is constitutionally prohibited.

Now, in *Bridges* v. *California* we have a situation where the Petitioner's case rested upon comments, where the newspaper commented upon a conviction involving a pending case before the California Court. There were two different articles which were the basis for the contempt citation. As Your Honor may be aware, Harry Bridges was the president of the International Longshoremen's Association and it was an election case and it was decided and won. The editorials said, "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment [16] to the jute mill." This was concerning a probation hearing and it was printed before the probation hearing came before the Judge.

Now, the articles go on to talk about union gangster activity. They are vituperative and false. Another story was of a telegram sent to the Secretary of Labor by Mr. Bridges which referred to the Judge's decision as quote, outrageous, and not to allow the State Courts to override the union majority. It said enforcement by the California Courts would tie up the entire West Coast and therefore,

pressure of the most onerous and difficult type. It was an extraordinary attempt to influence a Judge.

In spite of a finding by the California Court of a grave danger, the Supreme Court reversed holding that the telegrams were not so severe a danger as to create a danger of a constitutional magnitude and I would like to read from some of the portions of that case because I think that case sets the groundwork for the modern law.

First of all the standard was articulated that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death unless [17] they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

The test as articulated in *Bridges* v. *California* set forth in the brief is that the substantive evil must be extremely serious and the danger must be high. The evil itself must be substantial and the Court goes on to say that it's plain that the unqualified protection in the First Amendment should be given the widest possible effect consistent with an ordered society.

It went on to point out that we assume they're capable of withstanding criticism and even though it's vituperative and not basically accurate, there was no indication that the Judge would be influenced and no danger to the administration of justice and the Court then said, "To regard it therefore as a substantial influence upon the course of justice would be to impute to Judges a lack of firmness, wisdom or honor, which we cannot accept as a major premise." And the Court overruled the lower Court.

Justice Frankfurter dissented in that case, but the basis for his dissent was that there was a [18] pending case

and there was a threat in a pending case before the Court at that time and Justice Frankfurter has stated many times his view that the only basis for any restriction upon the press is if there is a pending case—actively pending—and there is an attempt to influence the result of that decision. Justice Frankfurter was the Justice most concerned about the extent of the danger and who wanted to justify a greater restriction on the rights of the press than did the majority.

The next case is the case of *Pennekamp* v. *Florida* and we speak for a unanimous Supreme Court. In that case were the editors and publishers of a newspaper. The contempt was based on two editorials and a cartoon. The cartoon accompanying one editorial caricatured the Court by a robed figure as a Judge tossing aside formal charges to hand a document marked "Defendant Dismissed" to a powerful figure at his left arm, intentionally drawn to show a criminal type. To the right of the bench a futile individual labeled "Public Interest" vainly protesting, was shown.

The criticism was unfair. The Supreme Court recognized it was not a balanced report and many important details were dismissed of the [19] caricaturing cartoon as obviously vituperative.

You have a gangster figure by the side of the Judge and as far as a motion for a rehearing, the article was directed as influencing the Court's decision and printing what the Court regarded as threats. The language was vituperative, but a unanimous Supreme Court ruled that this was not constitutional, protected the press, and once again I'm quoting from the *Pennekamp* v. *Florida,* again reiterating the evil "must be extremely serious and the

degree of serious imminence high before the utterance can be punished."

The Court did note and I will refer the Court to 328 U.S. at 344 where Court noted, "It is clear that the full truth in regard to the quashing of the indictments was not published." So, here we have a protection of something that was not accurate. The full truth was not published and that was to be distinguished from the instant case where the full truth was published.

"Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." And they went on, even looking at that cartoon aimed at a specific Judge and a specific [20] situation and said, "We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all other doors behind it."

I think the difference in those cases is almost extraordinary. We then go to *Craig* v. *Harney* and that was a case where a lay Judge was sitting in Texas and the Jury and the lay Judge disagreed over the verdict to be rendered in the case. The Judge locked the Jury in the Courthouse or in the vicinity overnight and forced a verdict and forced the Jury to finally render a verdict against a serviceman.

The newspaper came out on a pending case while still before the Court on a motion for a rehearing criticizing the lay Judge again in vituperative language, indicating that the decision was wrong. The lower Court made findings of fact using the Bridges case as a test and said that yes, there was a clear and present danger to the administration of justice and yes, the Judge could be influenced

in his decision. In spite of those clearly defined findings of fact, the United States [21] overruled the decision and held that the report was constitutionally protected and again reiterated the language.

Once again they also noted that although the language was vituperative, it was directed at a sitting Judge in a pending case and not of the immediacy to have a constitutional restraint and did that even though it was false. I think the danger from false reports on the judicial process are immensely greater than the true reports. That hardly requires comment and these cases still remain in the law. They have not been overruled.

There are two other decisions we find to be particularly persuasive that the Supreme Court ruled on. It's a case of *Garrison* v. *Louisiana*. You might recall Garrison was a District Attorney in Louisiana who obtained some measure of fame during the Kennedy assassination when he indicated that the could prove a conspiracy. He accused the eight Judges in Louisiana of everything from laziness, inefficiency, to racketeer influence. Those charges were false and there was not even a reasonable basis for believing the charges. The case went to the United States Supreme Court and the United States Supreme Court overruled the [22] decision of the lower Court, holding that the charges were constitutionally protected and they did this in a civil libel claim and obviously there is more restriction of the freedom of speech in a case involving the majesty of criminal law, more so than a civil filing.

I would also call the Court's attention to the case of *United States* v. *Wood* which is cited *Wood* v. *Georgia* in our brief. A county sheriff accused the Judge involved in a case of race agitation and compared the investigating activities to the activities of the Ku Klux Klan. He was

charged with contempt and that in and of itself presented clear and imminent danger to the proper administration of justice in Superior Court.

In spite of that, the United States Supreme Court reversed. It said, "The type of danger evidenced by the record is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political truth."

It would seem that a simple comparison with [23] the facts in these cases with the instant case would show the type of restraint asked. In each of those except for *Garrison* v. *Louisiana* there was a pending case before the Court. In this case we're not dealing with a pending motion. In each of those there was an element of falseness, recklessness, certainly of vituperation, even an element of a threat in the Bridges case. It would certainly influence a Judge.

Here there is no falseness, no vituperation, no element of a threat. The difference is remarkable; and the difference in language, I don't think it's a difference in degree. The mere fact that someone is investigated in a democracy where we have to presuppose that the people know the difference between an investigation and guilt can't even be compared to the statement made by Garrison or the newspapers in *Pennekamp* v. *Florida* or *Bridges* v. *California*. This is not a difference in degree. It's a fundamental gulf. It's a simple case of constitutional protection.

I would like to also point out this is the most extraordinary statute if it applies to newspapers, which of course we do not believe it does, because it has no time limit.

Much was made [24] of the fact that the restriction in Bridges would have been of a short duration because anything could be said after the trial was ended and much was made of the right they had to punish for contempt because the trial was going on and the interference of that trial was very serious. Here there is no end to the restraint. The restraint goes on forever unless the Judicial Inquiry and Review Commission certifies to the Supreme Court of Virginia. So, if the Review Commission refuses to certify, we have an open-ended restraint on the right of the people to speak and the right of the newspaper to publish and it goes on to the statute of limitations.

I don't know of any case in the United States that has ever upheld such an all-encompassing restriction. I think this indicates one of the reasons why the statute should be interpreted so as to avoid this open-ended problem. I would also like to add that so far as we can determine there really are only three arguments that could be raised to show a clear and present danger and even though the State hasn't put on any evidence and failed completely in their burden of proof, we would like to deal with their arguments. They are rationally unsound.

[25] First would be that the Virginia Judges may be influenced in regard to pending cases. Well, that would assume that the Virginia judiciary was so weak willed and spineless so as to not have the character of the Florida and Texas judiciary to possess. We have a laudable tradition of Judges of character and integrity. They have made unpopular decisions in the past and will continue to make unpopular decisions in the future and there isn't any evidence that the Commonwealth can obtain that publication is going to have any influence on Judges and particularly Virginia Judges.

If anything, the law is much stronger in Virginia. The reason the Commonwealth didn't introduce evidence is because there is no evidence. Virginia Judges will continue to make hard decisions when they're called upon and there is no basis to anything different.

The Court: You say Virginia Judges would be influenced? What do you mean—other Judges or do you mean the Judge hearing that case?

Mr. Shumadine: We decided what we would do was to think of one reason that the Commonwealth could raise and we thought that they would say Virginia Judges would be influenced by the threat [26] of revelation of their names—that they couldn't function.

The Court: Judges in general—would it make them timid and in fear because their name was revealed?

Mr. Shumadine: They have got to prove it and they can't prove it. And the reason they can't is because, frankly, Virginia Judges are not going to be influenced by that situation and that is particularly true because Virginia Judges are at present subject to—or they're not subject to criticism because they don't deserve the criticism, but the newspaper has a right to criticize Judges and use vituperative language and they are protected in their rights in cases like *Garrison* v. *Louisiana*.

The Virginia judicial system hasn't demanded that the articles be written, but even if the articles were written and even if there were serious articles critical of Judges, there is no reason to believe that the Virginia judiciary would not have the same fortitude or, I suspect, a much greater fortitude than California or Texas and Florida, where the Supreme Court held that since the Judges were men of integrity and fortitude, they wouldn't be influenced and they wouldn't be influenced much [27] worse by anything here.

The second charge, if they were going to speculate and I think they have chosen speculation that maybe the Review Commisson couldn't operate unless it could maintain secrecy. The article was written after the hearing and once again we can presume that the men on that Commission are men of integrity and they're not going to be influenced by publicity. The question of whether that preference can be maintained in regard to the participants is not here and that is another case entirely. But even the preference cannot, and this comes from I believe, the Bridges case. Even the expression of alleged preference cannot be allowed to trample on the First Amendment rights. Even if it were preferable to hold the meeting in secret, it's not reasonable that the Commission could not function well even if it had to operate in public and whether it has to operate in public is not before us.

What is before us is publication after the event had become public—after the participants had made it known. It was the participants who divulged the information.

The third argument, I guess, that could be made would be that there would be some lack of [28] confidence in the judiciary as a whole because of the publication of a few isolated charges. As the United States Supreme Court has recognized in the Bridges case, I think the reverse is much more likely to be true. I think the danger of secrecy is not so much in what the government keeps secret, but in what the public believes the government keeps secret. I don't believe Mr. Campbell can make the argument that the condition of Judges in Virginia would be so deplorable that it's necessary to keep any charges made against them in secret so they could officially operate. There hasn't been any evidence to that fact and can't be. The far greater danger would be to say there is a legitimate reason for

having secrecy than the speculation carried by the secrecies. As the Court recognized in Bridges, it would be a graver danger to the effective functioning of the Judges and the effectual operation of the judicial process than any publicity and certainly, furthermore, when you compare—and we go back to the five cases we cited—when you compare the type of statements made in those five cases; a gangster sitting beside the bench, a threat of a strike on the West Coast—with the mild statement made here, and the Supreme Court held unanimously [29] in the Pennencamp case that that evidence was not enough and there was a finding of fact in the lower Court which they overruled, saying it was clear there was no constitutionality,—that the evidence did not amount to a constitutional degree.

Here we have an article after the fact with no pending case, no vituperation and a true article. If you can't publish falseness, it's surprising that we can't publish the truth in Virgina. I don't believe the constitutional cases to allow that distinction to be made.

In summary, we think that from the lack of evidence before us, number one there is no public danger. There certainly has been no evidence of any public danger, much less evidence of a clear and compelling present public danger of an imminent kind. Number two, we would like to point out there is no indication anywhere that the Judges in Virginia will be influenced; no danger of any breakdown of justice and no danger to any governmental interest.

Finally, we would like to argue and argue specifically that it's abundantly plain that the statute and the use of the word "divulge," applies solely to the participants, that it was the first [30] utterance that was intended to con-

stitute a crime by the legislature. The statute is clear, but even if it's not clear, under the well-established rules of statutory construction we will recognize in Virginia that any ambiguity should be strictly construed against the Commonwealth and in favor of the accused and Landmark is guilty of no crime because of publication of this article once it became public. It was not a crime and this statute doesn't mean to have every individual who repeats a rumor indicted for a crime and we would urge the Court to reject it.

Mr. Campbell: I'll not go through the brief. You did get a copy of my brief?

The Court: I have both briefs and I haven't really totally digested them.

COMMONWEALTH'S ARGUMENT ON THE MOTION TO DISMISS AND TO STRIKE

Mr. Campbell: I would like to point out first something that is not in Mr. Shumadine's brief and he didn't argue it and it could be easily overlooked, but I think it's very important that this is not just a statute that we're dealing with. We are dealing with the Constitution of Virginia. Article 6, Section 10 of the Constitution of Virginia or what we call the New Constitution, says that the General Assembly shall create a Judicial Review Commission consisting of members of [31] the judiciary, the bar, and the public and vested with the power to investigate charges which would be the power for retirement or censure or removal of a Judge. The Commission shall be authorized to conduct hearings and subpoena witnesses and documents. Proceedings before the Commission shall be confidential. It says, "shall be confidential." Then it goes on to say that if the Commission find the charges to be well-founded, may

file a formal complaint with the Supreme Court. At the end of the section it states that the General Assembly may also provide in the same manner for removal of any Judge of a Court not of record.

Well, now the General Assembly were mandated to set up this Judicial Review and Inquiry Board and that is what they did, but before we get to that we must go back to the Constitution of Virginia on the freedom of speech and the press and there are some words that I think should be particularly noted. It does give freedom of speech and press and states they are among the great bulwarks of liberty. Nobody can deny that, but it also says therein, "being responsible for the abuse of that right."

So here you have two provisions of the [32] Constitution of Virginia. The Court has certainly got to recognize they're both there because they are there. Code Section 2.1-37.13—the provisions we're talking about talks about the proceedings in the papers, including the identification of the subject Judge, shall be confidential and shall not be divulged by anyone except the Commission. You have got "confidential" and "not be divulged by anyone except the Commission." It's not saying any member of the Commission either. It says "the Commission" and it goes on to say that the charges are well founded and filed with the Supreme Court. It loses its confidentiality and what Mr. Shumadine has argued and he and I have both agreed that we have not found a case strictly in point—a recorded case which would possibly clear up some of these things. There is a similar type of law and possibly very parallel in California and noted in my brief that it has been discussed, but insofar as we know, no judicial decision on it. Mr. Shumadine has argued here about things, as far as I'm concerned, are irrelevant to the question to be decided

by the Court. The Commonwealth is not saying that the newspapers cannot criticize a Judge. That is completely a separate argument. Of course they can [33] criticize a Judge. Sometimes they might be held in contempt, but we recognize the right of anybody to criticize a Judge or any public official. It's done all the time.

What we're talking about here is the constitutional mandate of the State of Virginia and a law which sets up a procedure not only to investigate well-founded charges against a Judge, but to protect that Judge from charges that are not well founded.

Now, if the newspaper wanted to file a formal complaint against the Judge, the mechanics would be to go through the Review Commission. Once they did that, they become subject to this law, but if they wanted to criticize the Judge in an editorial or even in a newspaper article, there's no law says they can't unless they would come within some contempt provision.

Now, this issue was raised—the constitutionality of this statute, and I apologize to the Court that I don't have the Supreme Court of Virginia's records to put before them, but yesterday afternoon it hit me that this provision had been used in a case in Richmond. The attorney, who is Jeroid (phonics) Green—he's the fellow who, I think he sued Senator Willey over Senator Willey's writing [34] a letter to the College of William and Mary or something. Anyway, I believe he filed a complaint and made it known and he was charged with this section. He was convicted and he appealed it. I say I'm arguing this because I talked to the Commonwealth's Attorney in Richmond yesterday and he told me this. He said the First Amendment issues were raised in that case before the Supreme Court of Virginia and in 215 Virginia on page LXII you will find "Writs

of Error Refused, Jeroid (phonics) X. Green, Circuit Court of the City of Richmond, Supersedeas refused, dated April 14, 1975."

That is the case Mr. Davis, Commonwealth's Attorney in Richmond, gave me as being the case that he's talking about. Now, we know without having to look up cases that when the Supreme Court takes up a constitutional question, it takes up all constitutional questions, but he assured me that the First Amendment constitutional question had been raised by Mr. Green and that it was obviously considered by the Supreme Court and error was denied and therefore all constitutional questions have been decided by the Supreme Court of Virginia. I think too that Mr. Shumadine, if this were a different type of case, would have a good argument [35] when he talks about a clear and present or imminent danger, but that is not necessarily what we're talking about here.

Instead of a newspaper, say, criticizing a Judge which they could do and which I assume the Judge could answer back if he so desired, although I notice it's not the custom of Judges to reply to criticism of that nature, it's a very different thing to publish and the public are the ones that come before the Courts. When you read the article—I've lost it—which does identify the Judge and I'm using this not to state that I agree with the facts contained in here other than the name of the Judge because that has been evidence. And by the way, Mr. Shumadine said we didn't present any evidence which, of course, is not the case. We have stipulated the evidence and it's before the Court, but to show you the reasons for this type of law and why it does pose a danger and I'll cite you some other laws that have nothing to do with the danger apparently stemming from charges of incompetence, indicating either that the

five-man panel found insufficient cause for action or that the case is still under review. "A number of local lawyers have confirmed privately, sources said. Most sources [36] indicate general incompetence was the issue in question. Although no one disclosed the specific charges, another source said—". And then to heighten the focus of the whole thing, in the first column, the print—and it's a misdemeanor to reveal Commission actions. In the second column they say, "All Review Board procedures are to be confidential unless the charges are held to be well founded. In that case a formal complaint can be filed with the Supreme Court and held in open Court."

You go back to relying on your sources and newspapers must rely on their sources and can't identify them. Otherwise they would lose them. It's no different from police informers or informers on criminal charges, but what does it do to the Judge whose picture and name, which is the identification, are in the article? What do we know? I have not stipulated to any truth in the article and no—contrary to the brief of the Defendant, but what do we know of the truth of any of this outside of the fact that someone has ascertained there had been a charge and a hearing? The rest of it—the identification and the rest of it so far as we know could be fiction because that is always possible when sources—"a number of local lawyers said—" are [37] used.

I would like to point out at this time I'm not stipulating to any facts related in Mr. Shumadine's brief and he has stated many facts in his brief which are not in evidence and I would ask the Court to ignore them or strike them from the brief because they are not evidence. There is a footnote on page 2 which says it's not an editorial and no position is stated. "He did no more than report the news."

Well, I don't know what an editorial is or a position is, but when they use words like "apparently incompetent" and "sources indicate competence was the issue", I don't know whether that is editorializing or not, but we're not talking about facts so that's the type of thing that I would ask the Court not to consider when considering his brief.

On page 4, he says, "Several of the participants at the hearing revealed to a reporter from Landmark that the fact of the investigation and the name of the Judge—". There is no evidence of that. You have the news article there, but we did not stipulate as to that truth contained in the article. We stipulated to the fact that that is the newspaper and that is the article.

[38] On page 5 here is a reference to Mr. Dunn and I don't say that is not so at all, that he made the decision and what he thought, but it's at this point not evidence, I would like to point out.

On page 6 he says, "So far as this record will show, the information may have been commonly known within the Norfolk legal community or perhaps even beyond the legal community and into the community at large." Pure speculation. If he's going to speculate and we're going to decide the case on speculation, the Commonwealth will have the right to speculate.

For instance, what effect it would have on this particular Judge if there was absolutely nothing to the charges as finally found by the Commission—and we don't know. I myself can state this to the Court: I do not know what the charges were against that Judge and I have asked and I have asked people who do know and they say, "I cannot tell you."

On page 9 he says, "The information was, of course, made public when it was given to the reporter or re-

porters." We don't even know it was given to a reporter. There's no evidence to that. Now, as to his definition as to "divulge," saying [39] that once it's divulged, then that's the end of it. That is a complete misconstruction of the word "divulge" as I understand it. I use a different dictionary from him, I notice.

He used Webster's Third International and I've got Webster's Second College Edition. "To make public, disclose, reveal, make known." So there is a different interpretation or a different definition for that word—"to make public." But the only information this case has before it today is the fact that Landmark Communications is the first to have made this public and unless the Court by speculation can believe what is stated in the article, that's all the evidence.

Now, down through the brief that Mr. Shumadine has presented, there are other items I would construe as being evidence assumed by him and I would ask, but I won't go into it, and ask the Court to consider only the evidence it has before it.

Mr. Shumadine quoted a while ago from Mr. Justice Stuart?

Mr. Shumadine: Yes.

Mr. Campbell: Justice Stuart's article was in the Media Handbook in which Mr. Shumadine [40] had a part in preparing and did a fine job, but Justice Louis [sic] F. Powell was also quoted in that Media Handbook, "Free press, fair trial," and so forth and I think the Court might be interested—I think it's on the last page of his presentation.

I'll just read this. "As an additional safeguard within the Bill of Rights we must avoid being confused by generalizations and slogans. There has been a disposition

sometimes to equate the news media and the public. Again, some persons have talked about a public right to know as if it were a constitutional right. It is not a constitutional right, but that is the theory on which the newspapers oftentimes—not always—but oftentimes operate. These generalizations miss the point.

The essence of freedom guaranteed with the First Amendment is to permit the unlimited expression of views about matters of public and political concern and to respect the sanctity of individual conscience and belief. We have recognized there are areas of privacy in which respect for the individual and his rights preclude the satisfaction of public curiosity." I think that last part boils down to exactly what we're talking about here, too.

[41] Now, getting into other areas that are to me analogous to this type of thing, even going to public records, look at the Juvenile Court System. Unless the Judge says so in particular cases, they're not going to publish the names of juveniles because the law says they can't.

Another statute which to my knowledge has really not been attacked, so I don't want to mislead the Court, but 53.3-22 says, "No newspaper shall print the details of the execution of criminals—only that he was executed shall be printed or publicized." Now, where is that clear and present danger to anything if they want to sensationalize an execution like used to be done, especially I think in some New York newspapers where they described in graphic details the last twitch of the body and that sort of thing?

Well, the legislature has decided that as a matter of public policy that is getting into more, even the degree, and they passed this law and it has stopped in Virginia.

Another area that Mr. Shumadine might want to address himself to and the Courts haven't gone into this, but it's

not included in either brief, but it's been upheld in many, many cases and it's [42] referred to and a copy is attached to my brief and that is the fa??? charges brought against lawyers themselves and not talking about the judiciary. We are talking about lawyers. Anybody can bring charges against an attorney before the District Committee of the Virginia State Bar. These meetings are not publicized.

In his Media Handbook, which Mr. Shumadine helped on --maybe he didn't have anything to do with that part, but it states in there how these hearings are conducted and they are conducted in secrecy. That type of law has been upheld throughout the United States. Again there is a particular reason for it; protection of persons from unfounded charges. You put it in the newspaper and whether it says, "Lawyer denies charge of incompetence," or whatever it might be, what does the public see? He's been charged with something—that is all. The fact he denied it doesn't mean anything. It's the same purpose of a statute like this.

Well, I think the rest of what I've been speaking about is taken care of in the brief and I know Mr. Shumadine's brief is much longer than mine is, but I really don't think that his hits the points we're talking about and if the Court will take [43] into consideration the fact we do have a Constitution in Virginia—that is the main thing that the General Assembly had to follow and did so in a way that cannot be ambiguous. Those words they use in there are common to everybody, but anybody—any lawyer can twist a meaning out of them that he wants to.

Landmark's Rebuttal

Mr. Shumadine: I would like to begin by noting a significant statement made by Mr. Campbell. First of all,

Mr. Campbell points out in looking at the different dictionaries and he seems to be admitting very plainly there might be two different meanings of the word. We think it has one meaning and deals only with the original utterance and he's admitting another meaning can be applicable.

If the Court will recognize the well-recognized rule of criminal construction, that will dispose of the case. If there were two possible interpretations, then the Defendant receives the benefit and the Defendant should be dismissed. He should not be convicted of a crime where there are two possible meanings.

Second, he referred to a statute which is most significant and that is the one about the executions. First of all he does admit it's never been challenged and I know why. Few newspapers [44] have the poor taste to want to challenge that law, even though it may be unconstitutional. When the legislature intended to refer to newspapers, they didn't say, "No person shall divulge." They said "no newspaper," and they name the newspaper and they said exactly what the newspaper shouldn't do. They didn't try to go behind and around in order to make their purpose clear. They made it definitely clear and when he compared that statute with the one before the Court today, I think it becomes abundantly clear that statute doesn't apply to newspapers.

The Assembly knows how to make a statute apply to a newspaper. The Constitution of Virginia does say that the Commission shall be confidential, but the writers, some of the more skillful ones in Virginia, did not mention newspapers and they never said publication. They directed their remarks directly to the Commission. That constitutional Commission knew exactly how to say the newspaper shall not publish it.

You have to give serious effect to what I regard not as an oversight, but as a clear expression of intent. It's not

a crime to violate the confidentiality? The express language of the statute makes it a crime and we have to examine the [45] statute very strictly in criminal law. It says, "Any person who shall divulge information in violation of this provision shall be guilty of a misdemeanor." The word is "divulge," not losing the confidentiality which is a crime and I think it's most significant Mr. Campbell does not say that the example used in our defense today is unreasonable. Apparently he's going to punish the bridge group and we'll have an ever-widening set of concentric circles which may eventually encompass all the citizens of Norfolk.

There is nothing in the statute history that indicates that our legislature intended to apply the statute in this extraordinary fashion which would not only be trampling on the rights of the press, but on the rights of people to speak. No time limit—no speech ever about this particular Judge. We don't admit there is no case. There has never been a case filed against a newspaper and I think the reason there has never been a case filed against a newspaper is plain. No one thought this type of statute applied to newspapers. I know we never thought it applied to newspapers and we try to keep up with statutes that might have to do with rights of the press.

I think it's clear that this type of statute is prohibitive. The newspaper has a right [46] to print news. It's one of the most serious inhibitions that can possibly be enacted. I am interested that Mr. Campbell notes the case *United States* v. *New York Times* which we refer to as the Pentagon Papers Case. That was confidential paper and allegations were made by the government that there would be serious consequences to the publication. The New York Times standard in regard to a prior restraint

says "Unless there is an imminent danger to the national defense of the United States, no prior restraint can be permitted."

It's a case cited by Mr. Campbell. It's probably the most extraordinarily hard-hitting case on a constitutional restraint that can be found. When we talk about clear and present danger, it's the lowest First Amendment test. In a prior-restraint case, only the actual threat of the security of the United States can prevent a publication. We are talking about clear and present danger because that is the lowest standard ever applied and it's not met in this case and it's a test that Mr. Campbell has the burden of proof. He hasn't submitted any proof.

Now, I would like to deal with the case of Mr. Green and point out he was a participant and [47] his case is entirely different from the case here before us. If the Supreme Court considered the constitutional issues, I doubt they ever considered them from the standpoint of a newspaper which wasn't involved and we wouldn't consider that the newspaper was involved in that case. The refusal to grant a writ is hardly an acceptance—it wasn't in the Supreme Court and it's entirely different. The Green case involving a participant is not the case that Your Honor has before you today. Now, I would like to point out Mr. Campbell seems to be arguing—making an interesting argument to reverse the burden of proof. It seems to me he has the burden of proof beyond a reasonable doubt on each and every element necessary to his case. I believe it's necessary that he establish that the material was confidential. There has been no evidence that it was confidential.

We certainly don't have to show that the material was not confidential. It's his burden of proof. This is a crim-

inal case, not a civil case. He's got to prove beyond a reasonable doubt that it was confidential. He's got to prove we were the, if I'm correct and I believe I am, that this statute applies only to the original utterance, and that we were the first utterance.

[48] He has introduced the news article and it makes it plain we got the information from sources. He's put it in himself. It's abundantly plain. He's put it on himself that we were not before the Commissioner. Mr. Campbell makes a very important point. Had we brought a charge, then we would have been subject to the law or the Commission. Now, I may be slightly misquoting him, but that was pretty clearly the indication he made. Since we didn't bring the charge, we never came under the confidentiality jurisdiction of the Commission. We never got that far—that the statute never dealt with Landmark or the Virginian-Pilot or the reporters.

Just as I don't believe the statute would apply to you or your wife if she heard the rumor and repeated it. I don't believe she would be guilty of a crime unless she was before the Commission. That was not intended.

We don't have the burden of proof in a criminal case. He's got to show confidentiality and original utterance and clear and present danger and facts. He can't come up and speculate. The government can always speculate and say there will be a reason a citizen will lose his liberty. Each of the cases that we've discussed talking about utterances [49] in Pennencamp, Craig, Wood and Bridges, evidence was presented why that would influence the Judge and the effect it would have and particularly in the last case there were substantial findings in fact that it did influence the Judge. The Court overruled, saying this isn't enough.

Now, once again I would like to point out he has quoted Justice Powell on a right-to-know case. Mr. Stewart made it plain that the Constitution was neither a freedom of information act. It doesn't open doors so long as the meeting remains confidential and someone doesn't reveal the information outside of the Commission and tell it to a reporter. It remains confidential, but once the door has been opened by a participant and he has made it public by telling it to a reporter or his wife, then the information becomes very widely known and it's public for all purposes. That is a most important distinction, that even if it's permissible to be confidential and that's not before us, but let's assume it's permissible—this confidentiality can be enforced and this statute can withstand scrutiny and the participants are under penalty of crime of what went on in the Commission room. Even if that is so, it would be an extraordinary break with [50] our liberties to have one of the participants to walk out of the room in front of 300 people and yell out, "Judge Blank is being investigated." Once he's done that, every one is still prohibited from speaking, writing, from talking, would be so fundamental a break with our liberties, I think it should cause us grave pause.

I think that is the initial divulgence which the legislature considered and I think we can give great faith in our legislators because they didn't intend it to be applied to newspapers and using the type of language Mr. Campbell has used and the other cases that we've talked about that have not been challenged—they also involve an extraordinarily different range of subjects—private individuals.

The plain fact is that a Judge is one of the most important officials in a democracy, that he is subject to criticism and there is a right to write news about the Review Commission.

It's hypothetical, but let's assume that some people got on the Commission and didn't do their job—that the five members of the Commission decided they weren't going to function. They weren't going to ever certify anyone and while we almost never have a problem with corruption in Virginia, hardening [51] of the arteries is a similar affliction. Let's assume some of the Judges are unable to function or are stricken with strokes. If this is constitutional and the Commission refuses to certify, you can never write about that. You can never say the Review Commission isn't functioning? They won't certify?

Now that is a most important area of public interest. That is a type of prior restraint that I think would be unheard of in this country. I think it's so far reaching as to almost defy thought to think we would say this Commission alone, of all agencies of government is not subject to criticism, is not subject to review, that the public and press' mouths are forever sewn shut on the matter of criminal law.

The cases cited by Mr. Campbell is imminent danger to the government. It's not an imminent threat to the destruction of government.

Now I believe we have covered each of the points cited by Mr. Campbell and once again I emphasize the fact that I think the easy way to dispose of this case is to—Mr. Campbell has admitted the word "divulge" has two meanings. It has an everyday meaning and that is only to the initial utterance. The General Assembly knows how [52] to make it apply to newspapers and this doesn't. I think there is no evidence of clear and present danger. Mr. Campbell has utterly failed in meeting his clear burden of proof and as a matter of law there is no clear and present danger in the light of this article in comparison

to the cases I've cited. The charges are so mild there can be no danger and if the statute applies in that respect, then we move to strike the Commonwealth's evidence to hold that Landmark is guilty of no crime whatever.

The Court: You gentlemen have certainly presented and hit the issues very clearly. Normally I like to dispose of a case as soon as I hear it, but I think this does demand for me to take more time. I have read your briefs, but to study them and I would like to read some of these cases in full and it just seems to follow—you went into a great deal of detail and I think to do proper justice to this issue, I'm going to study these cases in full. I want to read the cases themselves you've cited and study the issue and I want to make a disposition later—not a long time from now, but relatively soon. I don't know if it would be convenient for you gentlemen to fix a date.

Mr. Campbell: Right now it's on a Motion [53] to Strike and Mr. Shumadine—I don't whether he wants—

Mr. Shumadine: I'll put on Mr. Dunn if you're going to overrule.

The Court: The bigger issues are the ones I've got to wrestle with. The immediate ones about the indictment I'm going to overrule. The ultimate decision—the constitutional question—the criminal interpretation, the language—that is the one I'm going to have to wrestle with. Like I say, you gentlemen, if it's convenient for you to fix a date within twenty days or so or something of that nature—

Mr. Shumadine: If you would overrule the motion I think I will put on Mr. Dunn because we do want to have a little bit of information for the record.

The Court: All right.

Mr. Shumadine: Mr. John Dunn, please.

[54] [TESTIMONY OF JOSEPH W. DUNN, JR.]

JOSEPH W. DUNN, called as a witness on behalf of the Defendant, after having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Shumadine:

Q. Would you state your name and address for the record? A. Joseph W. Dunn, Jr., 216 84th Street, Virginia Beach, Virgina.

Q. What is your position, Mr. Dunn? A. I'm Managing Editor of the Virginian-Pilot.

Q. What are the duties of the Editor? A. Basically the duties of the Managing Editor are to oversee both administratively and in day-to-day operations the functions of the News Room of the Virginian-Pilot and its employees.

Q. Who decides whether to run an article in the paper? A. A normal article may be decided by any number of editors. If there is a question about a specific article, that article is brought to me for a decision.

[55] Q. Are you familiar with the article which is involved in this suit? A. Yes, I am.

Q. Who decided to run that article? A. I did.

Q. Why did you make that decision, Mr. Dunn? A. I made the decision to run that story on the basis that I felt it was a very important story—important because it involved an individual who is intently involved in the judicial process, who obviously had been under investigation in terms of a serious nature.

A complaint had been filed many months prior to the hearing that was conducted in Scope and that I felt it was a matter that should be brought to the attention of the people.

Q. Were you aware of the existence of a Virginia statute that involved the Commission? A. At the time I made the decision I was not aware of the existence of the Virginia statute which is in question today. I was aware there was a misdemeanor penalty in terms of the divulgence of information or the revealing of information on the part of people that participated and that was my understanding and my judgment.

Q. Did you feel that the statute applied to newspapers? [56] A. No, I did not.

Q. Why was that? A. I have in the 13 years I've been associated with the Virginian-Pilot been schooled by you and by many others in the legal profession in terms of prior restraint, libel, First Amendment rights and it was inconceivable and never crossed my mind to be frank, that a statute in the Commonwealth of Virginia or any other state would be so written to prohibit a newspaper from publishing information of that importance. It was inconceivable to me.

Q. Were any of the reporters or employees or agents of Landmark subpoenaed before the Commission? A. No, they were not.

Q. When did you begin to hear about the story, Mr. Dunn? A. My first knowledge of the story came on Friday afternoon, which I believe was October 3rd, the day prior to publication. It came to me on the basis of written information which is turned in daily by the various editors to me indicating what we plan to write for the following day's paper, so I heard initially myself of the story about 4:00 or 4:30 the day before publication.

Mr. Shumadine: We have no further questions.

Transcript of Proceedings held on December 10, 1975

[57] *Cross Examination by Mr. Campbell:*

Q. You did not consult legal counsel before this? A. I did not consult legal counsel.

Q. And as far as your judgment is concerned on what the law is, the fact is there are, for instance, libel suits pending against the newspaper, are there not? A. That's correct.

Q. And the fact is that since you have been with the newspaper some libel suits have been sustained against the newspaper? A. Not against my newspaper to my knowledge, Mr. Campbell.

Q. Landmark Communications? A. Not to my knowledge. You refer to libel suits if I understand you correctly.

Q. Yes. A. Not to my knowledge.

Q. Did you read the statute before you made your decision? A. No, I did not. As a matter of fact I was not apprised of the specific citation in the Virginia Code Book.

[58] Mr. Campbell: That's all, thank you.

The Witness: You're quite welcome.

(Witness excused).

The Court: I'm going to do this—take this under advisement and I suppose rather than fixing a date now relatively soon, 15 or 20 days from now, we'll set it down and make the disposition.

Mr. Campbell: I can set it now if Mr. Shumadine has his dates.

The Court: Whatever is convenient for you.

Mr. Shumadine: It might be that the Court, after reading the briefs, will ask for further authority

Transcript of Proceedings held on December 10, 1975

from counsel and we are here to be of aid to the Court in whatever the Court wants.

The Court: If you have anything that you think will shed light, please give it to me, because I wish to study it. Once again, as I say, in 15 or 20 days I can let you gentlemen go and you can fix a date.

Mr. Shumadine: That will be fine, Your Honor.

[Certificate of Court Reporter Omitted in Printing]

Commonwealth's Trial Exhibit C-3

(copy of the news article of October 4, 1975 published in The Virginian-Pilot)

(See Opposite) ☞

Possible Discipline

Hearing Held About Judge

By STEVE GOLDBERG

Virginian-Pilot Staff Writer

NORFOLK — A formal hearing concerning possible disciplinary action against Juvenile and Domestic Relations Court Judge H. Warrington (Spike) Sharp was held early last month.

The two-day hearing at Holiday Inn-Scope, conducted by members of the state Judicial Inquiry and Review Commission, apparently stemmed from charges of incompetence against the 55-year-old judge.

No formal complaint has been filed by the commission against Sharp, indicating either that the five-man panel found insufficient cause for action or that the case is still under review.

No commission member would say which is the case.

The review board is the state's most serious mechanism for policing judicial conduct. Its decision to press a formal complaint to the State Supreme Court could lead to retirement, censure, or removal from office.

Hearings and subsequent deliberation are conducted in strict secrecy since it is a misdemeanor to reveal commission actions.

Nevertheless, a number of local lawyers have confirmed privately since the first week of September that the hearing did take place. It is the first such investigation held here since the board was created in 1973, several said.

Sharp himself replied, "No comment" to a series of questions about the procedure.

Reno S. Harp III, deputy attorney general, headed the prosecution, sources said. Lawyer William L. Ward defended Sharp. The session stretched to two days. Otherwise, few details are known.

Most sources indicate general competence was the issue in question, although no one disclosed the specific charges. "It was more a melange of general complaints," said a lawyer subpoenaed to appear at the hearing.

Judge Sharp

Another source said that complaints from both citizens and lawyers were aired.

A typical response came from one assistant Commonwealth's attorney, identified as a witness at the hearing. "I can't even acknowledge that I know what you're talking about," he said. "And don't you dare tell anyone I've even talked to you."

All review board procedures are to be confidential unless charges (reviewed at a hearing) are held to be well-founded. If that happens, a formal complaint may be filed with the State Supreme Court and a hearing conducted in open court.

There are five commission members: Thomas L. Phillips of Lynchburg and Fred Bateman of Newport News, both lawyers; Judges Franklin Backus of Alexandria and Ernest W. Ballou of Roanoke; and Dr. George M. Modlin, retired chancellor of the University of Richmond. Modlin is chairman.

According to Harp, the commission has brought a recommendation to the State Supreme Court only once. That came in the case of Radford Circuit Court Judge Southall Jordan, who was subsequently censured for representing his son in General District Court on two separate traffic charges.

(See Hearing, Page B4)

Hearing on Judge

Continued from Page B1

No commission member would confirm that action has been completed, or is still pending in the Sharp case. (The group's next regular meeting is scheduled for Oct. 17.)

Anyone — lawyer, fellow judge, or individual citizen — can lodge a complaint with the Inquiry and Review Commission. Conduct or mental and physical competence may be questioned. One lawyer noted that the board was originally viewed by many legislators as a mechanism for replacing judges who had become senile or otherwise impaired.

Commission member Bateman said that if a judge is determined to be disabled, he may retire with full benefits. If he is removed for incompetence, retirement and other benefits are lost.

Once a complaint is filed, an investigator (commission staff includes one lawyer and one non-lawyer) or a commission member is sent to explore the charge.

A Norfolk lawyer said he was visited in late June or early July by a special investigative officer "who asked a lot of questions (about Sharp)."

The man was later called as a witness.

If evidence is deemed sufficient, a formal hearing such as the one in Norfolk is held. According to Bateman, the commission holds hearings about 15 to 20 days each year. Perhaps half a dozen of those are considered formal.

When asked why only one case had ever been referred to the Supreme Court, Bateman said, "Several (judges) did resign . . . A number have retired or something like that."

Sharp, a Norfolk County native, became an associate judge in Juvenile and Domestic Relations Court in 1960, succeeding Alfred W. Whitehurst.

He was reappointed to six-year terms in 1967 and 1973, following unanimous votes of the Circuit Court judges.

Under judicial reform legislation passed in 1973, the procedure for selecting lower court judges was altered. The General Assembly assumed responsibility for their election.

Judges were given the option of continuing their term or going before the legislature for reappointment. Most judges, including Sharp, chose the latter route.

No complaints were logged against him during legislative hearings conducted then, one local legislator said. Sharp's present term will expire in January 1990.

Order of the Circuit Court of the City of Norfolk dated December 10, 1975, denying Landmark's motions and taking the matter under advisement

VIRGINIA:

In the Circuit Court of the City of Norfolk, on the 10th day of December, in the year 1975.

[Caption and names of attorneys omitted in printing]

Landmark Communications, Inc., a Virginia Corporation, who stands indicted for Divulging Identification of Judge Subject of Investigation and Hearing of Judicial Inquiry and Review Commission, this day appeared in Court by its representative, Glen Hampton, and came as well the Attorney for the Commonwealth and the Attorney for the Accused, as aforesaid, and thereupon the accused, by counsel, moved the Court to quash the aforesaid indictment, which said motion being argued by counsel and fully heard by the Court, is overruled, to which action of the Court in overruling the said motion, the accused, by counsel, duly excepted. Thereupon on arraignment, the accused, by counsel, entered a plea of Not Guilty to the said indictment, waived trial by jury, and the whole matter of law and fact was heard and determined by the Court. Having heard the evidence introduced on behalf of the Commonwealth, thereupon, the accused, by counsel, moved the Court to strike the Commonwealth's evidence, which said motion having been argued by counsel, and fully heard by the Court, is overruled, to which action of the Court in overruling said motion, the accused, by counsel, duly excepted. Having heard all the evidence and testimony, and argument of counsel, and having received exhibits in the

Order of the Circuit Court of the City of Norfolk dated December 10, 1975, denying Landmark's motions and taking the matter under advisement

case, the Court doth take the matter of finding under advisement, and doth order that this case be continued on the docket of this Court.

/s/ ALFRED W. WHITEHURST
Judge

Order of the Circuit Court of the City of Norfolk dated January 15, 1976 Finding Landmark Guilty as Charged

VIRGINIA:

In the Circuit Court of the City of Norfolk, on the 15th day of January, in the year 1976.

[Caption and names of attorneys omitted in printing]

This day again came Landmark Communications, Inc., a Virginia Corporation, who stands indicted for Divulging Identification of Judge Subject of Investigation and Hearing of Judicial Inquiry and Review Commission, in the person of its representative, Glen Hampton, and came as well the Attorney of the Commonwealth in the person of Joseph H. Campbell and the Attorney for the Accused in the person of Conrad M. Shumadine, pursuant to continuance order entered on the 10th day of December 1975; and it appearing to the Court that the accused was tried on the 10th day of December 1975 on a misdemeanor indictment for Divulging Identification of Judge Subject of Investigation and Hearing of Judicial Inquiry and Review Commission, and the matter of a finding having been taken under advisement, and now being fully heard and determined by the Court; the Court doth find the defendant Guilty as charged in the said misdemeanor indictment and doth fix punishment at a fine in the sum of five hundred dollars ($500.00) and that the defendant be required to pay the costs of prosecution.

/s/ ALFRED W. WHITEHURST
Judge

Letter from Conrad M. Shumadine to the Honorable Alfred W. Whitehurst dated January 27, 1976, noting Landmark's objections and exceptions

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

[Letterhead of Kaufman, Oberndorfer and Spainhour]

January 27, 1976

The Honorable Alfred W. Whitehurst
Judge of the Circuit Court
City of Norfolk
Norfolk, Virginia

Re: Commonwealth of Virginia v.
Landmark Communications, Inc.
(M-34-76)

Dear Judge Whitehurst:

You will recall that I telephoned you today to discuss the fact that inadvertently the objections and exceptions of Landmark had not been made a part of the Final Order. I advised you that I had discussed the matter with Mr. Campbell, and he agreed that exceptions and objections were duly made and noted, and you suggested that I write you to advise you of the language which should be included. We would ask that the following be included.

> The defendant, by counsel, renewed its Motion to Strike the Commonwealth's evidence on the grounds that it was insufficient, and this Motion was overruled, and defendant, by counsel, duly objected and excepted. Defendant, by counsel, duly objected and excepted to

Letter from Conrad M. Shumadine to the Honorable Alfred W. Whitehurst dated January 27, 1976, noting Landmark's objections and exceptions

the action of the Court in finding the defendant guilty on the grounds that the statute does not apply to newspaper publication, that insufficient evidence was introduced to support a conviction, that if the statute applies to newspaper publication, it is unconstitutional and on the other grounds more specifically set forth in the memoranda and arguments of counsel.

I also note that the Order refers to Mr. Glenn Hampton as Landmark's representative. Mr. Hampton is an associate with our firm. Landmark's representative was Mr. John O. Wynne, its corporate secretary.

I am, of course, sending a copy of this letter to Mr. Campbell.

I appreciate the Court's courtesy. If there are any questions, we would be delighted to discuss the matter with you.

Respectfully yours,

KAUFMAN, OBERNDORFER and SPAINHOUR

/s/ CONRAD M. SHUMADINE

CMS:bb

CC: Joseph H. Campbell, Esquire

Notice of Appeal and Assignments of Error, filed January 27, 1976 with the Clerk of the Circuit Court of the City of Norfolk

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

[Caption Omitted in Priting]

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

To: Clerk of the Circuit Court
of the City of Norfolk

NOTICE OF APPEAL

Pursuant to the Rules of the Supreme Court of Virginia, Defendant, Landmark Communications, Inc. ("Landmark"), will file a Petition for Appeal in the Supreme Court of Virginia and requests that you prepare and transmit the record on appeal to the Supreme Court of Virginia. A transcript of the proceedings will be filed.

ASSIGNMENTS OF ERROR

The trial court erred in:

(A) Refusing to grant Landmark's Motion to Dismiss, Motion to Strike the Commonwealth's Evidence and Motion for a Directed Verdict;

(B) Holding that Section 2.1-37.13, Code of Virginia (1950), as amended, extends to the publication of information which has already been made public;

(C) Not holding Section 2.1-37.13, Code of Virginia (1950), as amended, unconstitutional on its face because it violates the First Amendment right of freedom of press;

BEST COPY AVAILABLE

Notice of Appeal and Assignments of Error, filed January 27, 1976 with the Clerk of the Circuit Court of the City of Norfolk

(D) Not holding Section 2.1-37.13, Code of Virginia, (1950), as amended, unconstitutional as it is applied to Landmark because it abridges Landmark's First Amendment right of freedom of press; and

(E) Finding Landmark guilty of a violation of Section 2.1-37.13, Code of Virginia, (1950), as amended, because, as a matter of law, the evidence is insufficient to support this conviction.

[Certificate of Service Omitted in Printing]

Opinion of the Supreme Court of Virginia, dated March 4, 1977 (also set forth at 1a of Jurisdictional Statement)

IN THE SUPREME COURT OF VIRGINIA

Record No. 760596

Present: All the Justices

LANDMARK COMMUNICATIONS, INC.

v.

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE HARRY L. CARRICO
Richmond, Virginia, March 4, 1977

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK
Alfred W. Whitehurst, Judge

The principal question in this case involves a confrontation between the First Amendment guaranty of freedom of the press and a Virginia statute which imposes criminal sanctions for breach of the confidentiality of proceedings before the Judicial Inquiry and Review Commission. A preliminary question is whether the appellant-newspaper is subject to the proscription of the statute.

Creation of the Judicial Inquiry and Review Commission was mandated by Article VI, Section 10 of the 1971 Constitution of Virginia for the purpose of investigating charges concerning disabled and unfit judges. The constitutional provision specifies that "[p]roceedings before the Commission shall be confidential."

The Commission was actually created by the General Assembly in 1971, at its session held to implement the new constitution. (1971 Va. Acts Spec. Sess. ch. 154; Va. Code §§ 2.1-37.1 *et seq.*) In the act creating the Commission, its powers and duties are outlined with detail. By the terms of Va. Code § 2.1-37.4, the Commission is empowered to investigate charges "which would be the basis for retirement, censure, or removal of a judge under § 10 of Article VI of the Constitution." If the Commission finds the charges well-founded and sufficient to constitute the basis for retirement, censure, or removal of a judge, it shall file a formal complaint with this court.[1]

Virginia Code § 2.1-37.13[2] provides in pertinent part that "[a]ll papers filed with and proceedings before the Com-

[1] Under Article VI, Section 10 of the Constitution, if this court finds the judge disabled to perform his duties, it shall retire him; if it finds he has engaged in misconduct while in office, it shall censure or remove him.

[2] "*§ 2.1-37.13. Confidentiality of papers and proceedings.*—

All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11, 2.1-37.12), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character. However, if the Commission shall find cause to believe that any witness under oath has willfully and intentionally testified falsely, the Commission may direct the chairman or one of its members to report such finding and the details leading thereto including any transcript thereof to the Commonwealth's attorney of the city or county where such act occurred for such disposition as to a charge of perjury as the Commonwealth may be advised. In any subsequent prosecution for perjury based thereon, the proceedings before the Commission relevant thereto shall lose their confidential character.

All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal, shall be kept in the confidential files of the Commission.

Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."

mission . . . including the identification of the subject judge . . . shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character." The Code section provides further that "[a]ny person who shall divulge information in violation . . . of this section shall be guilty of a misdemeanor."

The appellant, Landmark Communications, Inc., publishes *The Virginian-Pilot*, a newspaper of general circulation in the Tidewater area of Virginia. On October 4, 1975, the newspaper published an article stating that the Commission had conducted a "formal hearing concerning possible disciplinary action against" a judge, identified by name, of a court not of record in the City of Norfolk. The article recited further that the hearing "apparently stemmed from charges of incompetence against the . . . judge."

On November 5, 1975, Landmark was indicted for unlawfully divulging the identity of a judge who was "the subject of an investigation and hearing by the Judicial Inquiry and Review Commission." Upon trial of the indictment by the court without a jury, it was stipulated that Landmark had published the article in question; that the Commission had investigated charges and conducted hearings concerning the judge named in the article; and that, at the time of the publication, the Commission had

not filed a complaint with this court respecting the judge.[3] Landmark was convicted of the charge laid in the indictment, and it was fined the sum of $500.00.

On appeal, Landmark contends that it is unclear from a reading of Va. Code § 2.1-37.13 whether the statute's proscription against divulging information concerning a Commission proceeding applies not only to the participants in such a proceeding but also to a newspaper which publishes information obtained from one of the participants. Because the statute is penal in nature, Landmark argues, it must be strictly construed, and any doubt or ambiguity concerning its application must be resolved against the Commonwealth and in favor of one accused of its violation.

When the doubt or ambiguity in § 2.1-47.13 is so resolved, Landmark asserts, the statute should be construed to mean that a violation may occur only upon "the *first act of disclosure* . . . by an indivudual who had *actually participated* in some manner in the proceedings of [the] Commission." Under this construction and the circumstances of this case, Landmark concludes, the information concerning the judge in question "lost its confidentiality" and "became public upon its first disclosure" by a participant in the proceedings, and all Landmark did was to publish information "which was *voluntarily and freely* given to it."[4]

While we agree with Landmark that the statute must be construed strictly, we disagree with the remainder of

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[3] As of the date of this opinion, no complaint has been filed with this court concerning the judge in question.

[4] The record is silent, however, concerning the manner in which Landmark secured the information.

its argument. We hold that Va. Code § 2.1-37.13 does not suffer the doubt or ambiguity asserted by Landmark.

In unmistakable terms, the statute states that all information concerning a proceeding before the Commission, including the identity of the judge who is the subject of the inquiry, shall be confidential and that this confidentiality shall continue until a formal complaint against the judge is filed with this court. So far as is pertinent here, only upon the filing of such a complaint is the record of a proceeding before the Commission placed in the public domain; only then does information concerning a proceeding before the Commission lose its confidential character.

Until a complaint is filed with this court, the proscription of the statute is applicable to punish any *person* who *divulges* any information concerning a proceeding before the Commission. Although Landmark is a corporation, by the force of Va. Code § 1-13.19,[5] it is a "person" within the meaning of Va. Code § 2.1-37.13. To "divulge" information means to disclose it or to make it known. *Black's Law Dictionary* 567 (4th ed. 1951). When Landmark published its article, it disclosed or made known to the public at large information which still was confidential.

The proscription of Va. Code § 2.1-37.13 is so clear that it would be unreasonable to construe the statute, as Landmark interprets it, to mean that only the participants in a Commission proceeding are subject to the prescribed sanctions or that only the first disclosure of confidential information is actionable. Clearly, Landmark's actions

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[5] "*§ 1-13.19. Person.*—The word 'person' may extend and be applied to bodies politic and corporate as well as individuals."

violated Va. Code §2.1-37.13 and rendered it liable to imposition of the sanctions prescribed by the statute.

But, Landmark contends, to impose upon it the sanctions prescribed by Va. Code § 2.1-37.13 would unconstitutionally abridge its First Amendment guaranty of freedom of the press. This contention poses the serious question in the the case and presents an issue not decided previously by this court or, so far as our research discloses, by any other appellate court in this country. The importance of the question is emphasized when it is considered that 34 jurisdictions in addition to Virginia, by constitutional provision, statute, or rule, require confidentiality of proceedings before bodies similar to our Judicial Inquiry and Review Commission.[6]

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press." Clearly, "the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Nebraska Press Ass'n* v. *Stuart*, —— U.S. ——, 49 L.Ed. 2d 683, 696 (1976). Freedom of the press, however, is not an absolute right, and the state may punish its abuse. *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931). But when and under what circumstances a state may punish such an abuse is the difficult question, given the uncertainty

[6] Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin, and Wyoming. American Judicature Society, *Judicial Disability and Removal Commission, Courts and Procedures* (1973).

created by the numerous decisions interpreting First Amendment rights.

From a review of the decisions of the United States Supreme Court involving restrictions upon First Amendment freedom of the press, it appears that the cases fall into three general categories: (1) denial of right of access to information; (2) prior restraint upon publication; and (3) subsequent punishment for publication. The present case involves no denial of access; Landmark concedes that it has no greater constitutional right of access than the general public to information concerning Commission proceedings. *See Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974); *Pell* v. *Procunier*, 417 U.S. 817 (1974).

While conceding that it is "difficult to determine whether the instant case is a 'prior restraint' or 'subsequent punishment' case," Landmark contends that Va. Code § 2.1-37.13 does impose a prior restraint upon publication. Prior restraints, Landmark asserts, bear a heavy presumption against their constitutional validity, *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971), and are permissible only (1) to protect the national security, (2) to prevent the publication of obscenity, and (3) to prohibit expression associated with situations which tend to incite acts of violence and the overthrow by force of government. *Near* v. *Minnesota*, 283 U.S. at 716. Because the publication in the present case does not fall within one of these exceptions, Landmark concludes, the prior restraint imposed by Va. Code § 2.1-37.13 is constitutionally impermissible.

We are of opinion, however, that Va. Code § 2.1-37.13 does not impose a prior restraint upon publication. Gen-

erally, prior restraints take the form of injunctions, requirements for licenses or permits, or censorship or previous review. Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation,* 51 Notre Dame Lawyer 898 (1975-1976). A prior restraint "has an immediate and irreversible sanction." *Nebraska Press Ass'n* v. *Stuart,* —— U.S. at ——, 49 L.Ed.2d at 697-98. By contrast, Va. Code § 2.1-37.13 seeks to preserve the confidentiality of Commission proceedings by providing for the imposition of criminal sanctions *after* the statute has been violated. Thus, Virginia's proscription fits properly within the "subsequent punishment" category of cases.

The distinction between "prior restraint" and "subsequent puninshment" is based upon "a theory deeply etched in our law," *viz.,* that " a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 559 (1975). Accordingly, the "presumption against prior restraints is heavier—and the degree of protection broader —than that against limits on expression imposed by criminal penalties." *Id.* at 558-59.

But even though this may be a "subsequent punishment" case and not subject to the heavy presumption against invalidity, Landmark argues, it does not follow that publication of the article in question is punishable by the Commonwealth. In "subsequent punishment" cases, Landmark asserts, the Supreme Court's decisions require that before a state may punish a violation of a restriction upon expression, it must satisfy the "clear and present danger" test. This test, opines Landmark, requires the state to

prove by "actual facts" that the expression it seeks to prohibit would result in an evil which is substantial and imminent, posing a clear and present danger to a legitimate governmental interest.

The governmental interest involved here, Landmark says, is the orderly administration of justice; the burden was upon the Commonwealth, therefore, to prove by "actual facts" that publication of the article in question created a clear and present danger to the administration of justice in Virginia. Because the Commonwealth failed to produce "actual facts" showing a clear and present danger, Landmark concludes, the judgment imposing the sanction upon it is invalid under Supreme Court decisions interpreting the First Amendment.

Upon examination of the Supreme Court's decisions, we find that the "clear and present danger" standard was enunciated in *Schenck* v. *United States,* 249 U.S. 47 (1919). *Schenck* involved defendants charged with circulating printed matter alleged to constitute a violation of the Espionage Act of June 15, 1917. In defense, the First Amendment freedoms of speech and press were asserted. In the course of its opinion upholding the convictions, the Court stated:

> "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . . We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is

done . . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force . . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." 249 U.S. at 51-52.

Subsequently, in a series of decisions, the Supreme Court applied the "clear and present danger" test to cases involving publications allegedly perilous to the orderly administration of justice. In *Bridges* v. *California*, 314 U.S. 252 (1941), *Pennekamp* v. *Florida*, 328 U.S. 331 (1946), *Craig* v. *Harney*, 331 U.S. 367 (1947), and *Wood* v. *Georgia*, 370 U.S. 375 (1962), the Court reversed convictions for contempt based upon out-of-court comment concerning pending cases. In each instance, the Court held that the particular expression involved was insufficient to pose a clear and present danger to the orderly administration of justice and, therefore, was protected by the First Amendment.

Bridges defined the scope of the "clear and present danger" standard. There, the Court stated:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can

> be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment . . . does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." 314 U.S. at 263.

It is upon *Bridges*, *Pennekamp*, *Craig*, and *Wood* that Landmark relies to support its assertion that before a state may punish expression, it must prove by "actual facts" the existence of a clear and present danger to the orderly administration of justice. *Bridges*, however, does not mention any requirement of evidence to establish a clear and present danger. But in *Craig*, the Court analyzed *Bridges* to have held that:

> "[T]he compulsion of the First Amendment, made applicable to the States by the Fourteenth . . . forbade the punishment by contempt for comment on pending cases in absence of *a showing* that the utterances created a 'clear and present danger' to the administration of justice." 331 U.S. at 372 (emphasis added).

And, in *Pennekamp*, the Court stated:

> "For circumstances to create a clear and present danger to judicial administration, *a solidity of the evidence* should be required . . . ." 328 U.S. at 347 (emphasis added).

Finally, in *Wood*, after criticizing the trial court for "simply [adopting] as conclusions of law the allegations made in the contempt citation," 370 U.S. at 387, the Court stated:

> "Hence, in the absence of *some other showing* of a substantive evil actually designed to impede the course of justice in justification of the exercise of the contempt power to silence the petitioner, his utterances are entitled to be protected." 370 U.S. at 389 (emphasis added).

We agree with Landmark that there is no evidence in the record favorable to the Commonwealth's position beyond the stipulated facts showing Landmark had published the article in question, the Commission had investigated charges and conducted hearings concerning the judge named in the article, and, at the time of the publication, the Commission had not filed a complaint with this court respecting the judge. And we agree that Landmark cannot be punished for publishing the confidential information contained in the article unless the revelation created a clear and present danger to a legitimate state interest—the orderly administration of justice. But we do not agree with Landmark that, because the Commonwealth did not produce other evidence by way of "actual facts" to show a clear and present danger, *Bridges*, *Pennekamp*, *Craig*, and *Wood* require reversal of the judgment of the trial court.

In our opinion, the present case differs substantially from *Bridges*, *Pennekamp*, *Craig*, and *Wood*. Those decisions involved the *common law power* of a court to punish allegedly contemptous out-of-court statements concerning

pending cases. Necessarily, therefore, the imposition of sanctions in such circumstances was based, as the Court noted in *Bridges*, upon a "'concept of the most general and undefined nature.'" 314 U.S. at 260. Because the common law power of contempt is so general and undefined, the Court was concerned that, without evidence of a clear and present danger, fair public comment and criticism concerning a judge and the conduct of his judicial affairs would be "effectively discouraged." *Bridges*, 314 U.S. at 269.

By contrast, in the present case, the power of a Virginia court to punish out-of-court statements of the type published by Landmark is fixed by statute, Va. Code § 2.1-37.13, and the substantive offense for which the punishment may be imposed is clear and well-defined. The restraint upon expression imposed by the statute is limited, and it is related solely to the purpose sought to be served by the legislation: the preservation of the confidentiality of Commission proceedings. The statute does not seek to discourage any comment or criticism concerning a judge or the conduct of his judicial affairs save the disclosure of information resulting from a breach of the confidentiality of Commission proceedings.

Virginia Code § 2.1-37.13 represents a legislative declaration by the General Assembly, fortified by a plain statement of public intent expressed in the Virginia Constitution, that a clear and present danger to the orderly administration of justice would be created by divulgence of the confidential proceedings of the Commission. We believe this legislative declaration elevates the restriction upon speech and press involved in this case to a level of legal dignity not enjoyed by the contempt judgments in-

volved in *Bridges, Pennekamp, Craig,* and *Wood.* Indeed, in *Wood,* which involved a Georgia contempt proceeding, the Supreme Court stated:

> "Initially, however, it should be noted that the Georgia courts have determined that the power to punish for contempt of court is inherent in its state judiciary . . . and the Court of Appeals thus ignored the express limitations imposed by the Georgia Legislature in punishing out-of-court statements . . . . This holding thus deprives the judgment of coming to this Court 'encased in the armor wrought by prior legislative deliberation' . . . ." 370 U.S. at 385-86.

And, in *Bridges,* which involved a California contempt proceeding, the Supreme Court said:

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations . . . .' [H]ere the legislature of California has not appraised a particular kind of situation and found a specific danger . . . sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that 'it must necessarily be found, as an original question,' that the specified publications

> involved created 'such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection.'" 314 U.S. at 260-61.

As we have noted, the imposition of punishment upon Landmark in this case does not depend upon some undefined concept of judicial authority. Instead, the sanction imposed springs from a clear and well-defined legislative declaration that breach of the confidentiality of Commission proceedings is so contrary to the public interest[7] that it constitutes a substantive evil of immediate and serious peril to the orderly administration of justice and, therefore, should be punishable. Accordingly, we believe the judgment imposing the sanction in this case is fortified against Landmark's constitutional attack because it is "encased in the armor wrought by prior legislative deliberation," and it is strengthened further by the requirement of the Virginia Constitution that proceedings before the Commission "shall be confidential."

We must note, however, that in the *Bridges* opinion the Supreme Court did observe: "even the expression of 'legislative preferences or beliefs' cannot transform minor

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[7] *Cf. Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), a case involving a civil action for breach of privacy. The Supreme Court held that the First Amendment protected the revelation in a television broadcast of the name of a rape victim, although the disclosure was violative of a Georgia statute which made it a misdemeanor to publish or broadcast the name. The news reporter, however, had obtained the victim's name from the indictment in the criminal case, which was a public record made available to the reporter for his inspection. The Court stated:

> "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." 420 U.S. at 495.

matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression." 314 U.S. at 263. But we believe the matters which, in the first place, prompted creation of the Judicial Inquiry and Review Commission, dictated the requirement of the Virginia Constitution that proceedings of the Commission "shall be confidential," and necessitated the enactment of the sanctions prescribed by Va. Code §2.1-37.13, are much more than "minor matters of public inconvenience or annoyance." They are matters involving a serious and substantive evil—the imminent and substantial threat to the orderly administration of justice posed by the premature disclosure of the confidential proceedings of the Judicial Inquiry and Review Commission. And they are matters upon which courtroom evidence is unnecessary to sustain their truth and validity.

History tells us that the methods of dealing with disabled or unfit judges by legislative impeachment[8] or removal,[9] existing prior to creation of the Commission, were seldom used and generally unsatisfactory. The inadequacies of those methods prompted inquiry into other means of handling problem judges. Led by California, numerous jurisdictions have created commissions or other bodies to investigate complaints against judges. Along with Virginia, many of the jurisdictions have imposed requirements of confidentiality in commission proceedings. Note 6, *supra*.

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[8] Section 54 of the Constitution of 1902 (Article IV, Section 17 of the Constitution of 1971).

[9] Section 104 of the Constitution of 1902 (omitted from the new constitution).

The necessity for confidentiality of commission proceedings is self-evident from this statement:

> "Proceedings before the Commission must be confidential. The initial job of the Commission will be to ascertain which complaints have sufficient merit to deserve serious attention. Obviously there is the risk that a disappointed litigant may seek to vent his wrath upon the judge by filing a complaint with the Review Commission, or that complaints will be filed upon other vexatious and frivolous grounds. Such complaints must be weeded out—hence the requirement of confidentiality of Commission proceedings." A. Howard, *Commentaries on the Constitution of Virginia* 764 (1974).

The California experience furnishes support for the confidentiality of commission proceedings:

> "A prime feature of the Commission plan for judicial discipline is that, unlike the impeachment, recall, and election processes, the charges, and investigation thereof, are not made public until and unless a recommendation for censure, removal or retirement is made to the Supreme Court. The proceedings are entirely confidential up to that point. This gives the individual judge and thereby the judiciary reputation protection until a full scale investigation has been made and a competent body of peers has made an adverse decision on the merits of the charge. The shield of confidentiality also preserves reputations while the corrective influence of the Commission is being exerted on a judge who would otherwise be reluctant to change

his behavior lest the public view this as an admission of prior misconduct . . . . Thus, reputations are preserved while allowing ample opportunity for complete investigation and voluntary corrective action." Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal With Judicial Misconduct*, 3 U.S.F.L. Rev. 244, 255-56 (1968-1969).

Florida requires confidentiality of proceedings before its Judicial Qualifications Commission, the counterpart of our Judicial Inquiry and Review Commission. In discussing the Commission, the Florida Supreme Court has stated:

"The purpose is to process complaints concerning the judiciary from any and all sources, while requiring confidentiality as a means to protect both the complainant from possible recriminations and the judicial officer from unsubstantiated charges . . . . Eliminating the confidentiality of these proceedings would also eliminate many sources of information and complaints received by the Commission not only from lay citizens and litigants but also from lawyers and judges within the system." *Forbes* v. *Earle*, 298 So.2d 1, 4 (Fla. 1974).

Thus, the requirement of confidentiality in Commission proceedings (1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses

from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious.

Considering those matters, we believe it can be said safely, without need of hard in-court evidence, that, absent a requirement of confidentiality, the Judicial Inquiry and Review Commission could not function properly or discharge effectively its intended purpose. Thus, sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings—the imminent impairment of the effectiveness of the Commission and the accompanying immediate threat to the orderly administration of justice.

The ultimate and real concern in this type of case is exemplified by a statement in *Pennekamp* v. *Florida:*

"[R]eviewing courts are brought in cases of this type to appraise the [press] comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes." 328 U.S. at 336.

We recognize the public interest in information pertaining to judicial discipline and in free debate upon the conduct of the judiciary. *See Wood* v. *Georgia*, 370 U.S. at 392. We find, however, that the statute in question places the least possible restraint upon this public interest while, at the same time, it assures effective functioning of the Commission. When a complaint is filed with this court, the entire record of the Commission's proceedings becomes public. And, as we have noted previously, the statute does

not curtail general comment or criticism concerning a judge or the conduct of his judicial affairs.

On balance, therefore, we find that the necessity of maintaining the integrity of the Judicial Inquiry and Review Commission as an essential component in the administration of justice clearly outweighs any possible advantage of public disclosure of the Commission's proceedings prior to the filing of a complaint with this court. Accordingly, we affirm the judgment of the trial court.

Affirmed.

Poff, J., dissenting.

I dissent. The judgment should be reversed and final judgment should be entered for the defendant. In my view, the statute should be construed not to apply to this defendant under these circumstances. Construed otherwise, the statute offends the First Amendment.

As the parties agree and the majority recognize, there is utterly no evidence of record showing a "clear and present danger". The majority simply conclude that the General Assembly concluded that there was a danger so clear and present as to justify a statutory abridgment of the right to publish. The majority reach their conclusion unaided by legislative history and without benefit of a declaration of such danger in the statute or the Constitution which mandates the statute. Just as a court cannot infer the existence of a clear and present danger from allegations made in a contempt citation and adopt that inference as a conclusion of law, *Wood* v. *Georgia*, 370 U.S. 375 (1962), a court cannot infer the existence of a clear

and present danger from the mere enactment of a penal statute.

If a restriction upon publication of lawfully-acquired information concerning the proceedings of a commission reviewing charges against a judicial officer can be constitutionally justified by a simple conclusion that publication poses a clear and present danger to the administration of justice, a similar conclusion could justify a similar restriction with reference to the proceedings of a commission reviewing charges against an executive officer or a legislator.

I simply believe that, in order to justify a statutory exception to the constitutional guarantee, there must be an *evidentiary* showing of a clear and present danger to a legitimate governmental interest, and an evidentiary showing that the statutory sanction is the minimum necessary to meet that danger and protect that interest. The legal presumption is in favor of the First Amendment and against the exception, and legal presumptions survive until rebutted by evidence.

Supreme Court, U. S.
FILED
MAY 21 1977
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In The

Supreme Court of the United States

October Term, 1976

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

On Appeal From The Supreme Court Of Virginia

MOTION TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF VIRGINIA

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In The

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No. 76-1450

LANDMARK COMMUNICATIONS, INC.,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

On Appeal From The Supreme Court Of Virginia

MOTION TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF VIRGINIA

PRELIMINARY STATEMENT

The appellee, Commonwealth of Virginia, respectfully moves this Honorable Court to affirm the judgment of the Supreme Court of Virginia entered on March 4, 1977, affirming the appellant's conviction in the Circuit Court of the City of Norfolk, Virginia.

OPINION BELOW

The judgment of the Supreme Court of Virginia has not been reported as of this time, but is set forth in full in the Appendix to the Jurisdictional Statement, pp. 1a-20a.

JURISDICTION

Appellant asserts that the jurisdiction of this Court is conferred by 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED

1. May the Commonwealth of Virginia subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before the State Judicial Inquiry and Review Commission, where such proceedings are expressly declared to be confidential by the State Constitution and Statutes?

2. Is the Commonwealth of Virginia required to produce actual facts of a clear and present danger to the administration of justice to support a conviction under Virginia Code Section 2.1-37.13, where such determination has been made in the State Constitution and Statute?

3. Is Virginia Code Section 2.1-37.13 unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution?

I.

The Commonwealth May Impose Criminal Sanctions For Divulging Information Regarding Proceedings Before The State Judicial Inquiry And Review Commission.

As noted by the Supreme Court of Virginia, the principal question in this case involves a confrontation between the

First Amendment guarantee of freedom of the press and the Virginia statute which imposes criminal sanctions for breach of the confidentiality of proceedings before the Judicial Inquiry and Review Commission ("Commission").

At the outset, it is critical to set out clearly what this case does not concern. This case does not involve a prior restraint. No injunction was sought to prevent Landmark from publishing the article in question, and the Supreme Court of Virginia found the case to involve subsequent punishment rather than prior restraint. This finding of the Supreme Court of Virginia is not being contested by Landmark upon this appeal. See Jurisdictional Statement, p. 8. Nor does this case present a situation where comment upon or criticism of a judge or the conduct of his judicial affairs is completely suppressed. The Supreme Court of Virginia specifically found that § 2.1-37.13 does not seek to discourage or curtail comment or criticism concerning a judge or the conduct of his judicial affairs (Appendix to Jurisdictional Statement, pp. 13a, 19a).

What this case does present is the right of a state, through its citizens and elected representatives, to declare certain matters of public interest to be confidential, and to punish those who breach that confidentiality.

The Commonwealth is fully cognizant of the rulings of this Court which hold that where the State places information in the public domain, it cannot restrain its publication. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1968); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Oklahoma Publishing Company* v. *District Court*, 97 S.Ct. 430 (1977).

The Commonwealth in this case, however, has followed the procedure outlined by this Court in *Cox Broadcasting Corp., supra*. In this regard, this Court stated:

> "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish." 420 U.S. at 496.

The Commonwealth has complied with the dictates of *Cox* by the passage of § 2.1-37.13. First, the Commonwealth has taken Commission matters out of the public domain by providing that proceedings of the Commission are to be confidential. The papers filed with the Commission are not made a part of any public record, and the proceedings are conducted in private. In this case, the Commonwealth has neither made available the information published by Landmark nor has the Commonwealth given her implicit approval that the information be made public. *Cf., Oklahoma Publishing Company* v. *District Court, supra.* Second, the interests in privacy have been weighed with the interests of the public to know and of the press to publish. The Supreme Court of Virginia has found that § 2.1-37.13 represents a legislative declaration by the Virginia General Assembly, fortified by a plain statement of public intent expressed in the Virginia Constitution, that a clear and present danger to the orderly administration of justice would be created by divulgence of the confidential proceedings of the Commission.

The interests of the State in preserving respect for the judicial system on the one hand have been balanced with the interest of a free press on the other. In speaking of balancing competing interests, Mr. Justice Brandeis in *Whitney* v. *California,* 274 U.S. 357 (1926), said:

> "[A]lthough the rights of free speech and assembly are fundamental, they are not in their nature absolute.

> Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic, or moral." 374 U.S. at 373.

Section 2.1-37.13 has its genesis in Article VI, Section 10, of the Constitution of Virginia (1971). This constitutional provision itself provides that proceedings before the Commission shall be confidential. A. E. Dick Howard, who served as Executive Director of the Virginia Commission on Constitutional Revision, sets forth the necessity for confidentiality of Commission proceedings as follows:

> "Proceedings before the Commission must be confidential. The initial job of the Commission will be to ascertain which complaints have sufficient merit to deserve serious attention. Obviously there is the risk that a disappointed litigant may seek to vent his wrath upon the judge by filing a complaint with the Review Commission, or that complaints will be filed upon other vexatious and frivolous grounds. Such complaints must be weeded out—hence the requirement of confidentiality of Commission proceedings." A. Howard, *Commentaries on the Constitution of Virginia,* 764 (1974).

As noted by the Supreme Court of Virginia, the California experience furnishes support for the confidentiality of Commission proceedings:

> "A prime feature of the Commission plan for judicial discipline is that, unlike the impeachment, recall, and election processes, the charges, and investigation thereof, are not made public until and unless a recommendation for censure, removal or retirement is made to the Supreme Court. The proceedings are entirely confidential up to that point. This gives the individual judge and thereby the judiciary reputation protection until a full scale investigation has been made and a

> competent body of peers has made an adverse decision on the merits of the charge. The shield of confidentiality also preserves reputations while the corrective influence of the Commission is being exerted on a judge who would otherwise be reluctant to change his behavior lest the public view this as an admission of prior misconduct. . . . Thus, reputations are preserved while allowing ample opportunity for complete investigation and voluntary corrective action." Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal With Judicial Misconduct*, 3 U.S.F.L. Rev. 244, 255-56 (1968-1969).

The American Bar Association has recommended that proceedings to review possible judicial misfeasance, nonfeasance and disability should be confidential unless the Commission recommends discipline by the highest court, at which time the Commission's record, upon being filed with the Court, should become public. A.B.A. Standards for Criminal Justice, *The Function of the Trial Judge*, § 9.1 (Approved Draft 1972). *Accord*, Reath, *Judicial Evaluation—The Counterpart to Merit Selection*, 60 A.B.A.J. 1246, 1248 (1974); Hazard, *Commission Introduces New Standards of Judicial Administration*, 60 A.B.A.J. 912, 914 (1974).

The criminal sanction provided by § 2.1-37.13 is nothing more than the remedy suggested in the views expressed by a number of justices of this Court in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (White and Stewart, J.J., concurring) (Marshall, J. concurring) (Blackmun, J. dissenting).

As previously noted, this case does not involve a prior restraint. There exists a distinction between prior restraint cases and those involving subsequent punishment. It is based upon the theory that "a free society prefers to punish the few who abuse rights of speech *after* they break the law

than to throttle them and all others beforehand." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975). Accordingly, the "presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Id.* at 558-59.

The restraint upon expression imposed by § 2.1-37.13 is narrowly limited, and it is related solely to the purpose sought to be served by the legislature: the preservation of the confidentiality of Commission proceedings. Newspapers, such as Landmark, as well as any person are free to comment upon or criticize any judge as they deem necessary and appropriate. Section 2.1-37.13 provides no impediment to such expression. The robust reporting and criticism of the criminal justice system spoken of in *Nebraska Press Ass'n.* v. *Stuart, supra*, is clearly alive and well in the Commonwealth of Virginia. The judicial system and members of the judiciary are routinely subjects of debate and criticism. It is only when the procedures of the Commission are sought to be invoked that the Commonwealth requires confidentiality, and even then § 2.1-37.13 provides confidentiality only to proceedings before the Commission. What is viewed in the public domain remains fair game for the press and public alike.

Freedom of the press is not absolute and beyond the reach of the state in appropriate circumstances. Mr. Chief Justice Hughes, writing for this Court in *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931), noted that freedom of the press is not an absolute right, and the State may punish its abuses. The Virginia Constitution in its Bill of Rights speaks of the rights to free speech and the press, but also points out that one must be responsible for the abuse of that right. Article I, Section 12 of the Constitution of Virginia (1971).

In speaking to this very issue, the Supreme Court of

Virginia in *Weston* v. *Commonwealth*, 195 Va. 175, 77 S.E. 2d 405 (1953), had occasion to state the proposition concisely:

> "Freedom of speech is a right which the courts have zealously guarded and maintained. But the right has its limitations and the State may punish its abuse. The right may not be exercised in such manner as to destroy respect for the courts, the very institution which is the guardian of that right. The dignity of the courts and the duty of the citizens to respect them are necessary adjuncts to the administration of justice." 195 Va. at 183.

The Commonwealth fully recognizes the public interest in information pertaining to judicial discipline and in free debate upon the conduct of the judiciary. But, as found by the Supreme Court of Virginia, "the statute in question places the least possible restraint upon this public interest while, at the same time, it assures effective functioning of the Commission." The Supreme Court of Virginia concluded its opinion by holding that the necessity of maintaining the integrity of the Judicial Inquiry and Review Commission as an essential component in the administration of justice clearly outweighs any possible advantage of the public disclosure of the Commission's proceedings prior to the filing of a complaint with the Supreme Court of Virginia.

II.

The Commonwealth Is Not Required To Produce Actual Facts To Show A Clear And Present Danger To The Administration Of Justice To Support A Conviction Under Virginia Code Section 2.1-37.13.

Landmark asserts that the decisions of this Court require that before a State may punish a violation of a restriction

upon expression, it must satisfy the "clear and present danger" test. It is additionally maintained that this test requires the State to prove by "actual facts" that the expression it seeks to prohibit would result in an evil which is both substantial and imminent, posing a clear and present danger to a legitimate governmental interest. For its position, Landmark relies upon *Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Wood* v. *Georgia*, 370 U.S. 375 (1962).

The Supreme Court of Virginia was unpersuaded that these cited cases controlled and found them to differ substantially from the present case. The Virginia Supreme Court found those cases to be concerned with the common law power of a court to punish allegedly contemptuous out-of-court statements concerning pending cases. As noted by this Court in *Bridges*, the imposition of sanctions in such circumstances was based upon a "concept of a most general and undefined nature." 314 U.S. at 260. This Court feared that without evidence of a clear and present danger, the undefined power of contempt would stifle the fair criticism of the judiciary.

In *Craig* v. *Harney, supra*, Mr. Justice Douglas, writing for the Court, points out clearly why those cases are distinguishable from the case now before this Court, when he said:

> "A trial is a public event. What transpires in the courtroom is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. *Those who see and hear what transpired can report it with impunity.* There is no special prerequisite of the ju-

diciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censure events which transpire in proceedings before it." 331 U.S. at 374. (Emphasis added.)

By contrast, the Supreme Court of Virginia found that the power of a Virginia court to punish out-of-court statements of the type published by Landmark is fixed by statute, and the substantive offense for which punishment may be imposed is clear and well-defined. The fact that the legislature has dealt with this question by statute places this case upon an entirely different footing than the cases relied upon by Landmark. Indeed, in *Wood*, this Court stated:

> "Initially, however, it should be noted that the Georgia courts have determined that the power to punish for contempt of court is inherent in its state judiciary . . . and the Court of Appeals thus ignored the express limitations imposed by the Georgia Legislature in punishing out-of-court statements. . . . This holding thus deprives the judgment of coming to this Court 'encased in the armor wrought by prior legislative deliberation' . . . ." 370 U.S. at 385-86.

It was also recognized in *Bridges*, that a declaration of a State's policy weighs heavily in any challenge of the law as infringing constitutional limitations. In this regard, this Court stated:

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the courtroom which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. . . .' [H]ere the legislature of California has not appraised a particular kind of situation and found a specific danger . . . sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that 'it must necessarily be found, as an original question,' that the specified publications involved created 'such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection.' " 314 U.S. at 260-61.

This case, unlike those relied upon by Landmark, comes to this Court not upon some uncircumscribed common law power of contempt, but encased in the armor wrought by prior legislative deliberation. The Supreme Court of Virginia found that the sanction imposed by § 2.1-37.13 "springs from a clear and well-defined legislative declaration that breach of the confidentiality of Commission proceedings is so contrary to the public interest that it constitutes a substantive evil of immediate and serious peril to the orderly administration of justice and, therefore, should be punishable."

The Supreme Court of Virginia went further to observe that minor matters of public inconvenience or annoyance could not be raised to the position of warranting the curtailment of liberty of expression simply by the passage of legislation. The Court recognized that historically the methods of dealing with disabled or unfit judges by legislative impeachment or removal were seldom used and generally unsatisfactory. These inadequacies led Virginia to join over 40 other states in adopting a commission or other bodies to investigate complaints against judges.

After reviewing the necessity for confidentiality of Commission proceedings the Supreme Court of Virginia found that confidentiality (1) protects the reputation of an in-

dividual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious. These findings are supported by legal writers. *See* Gasperini, *Judicial Review in New York: A New Look,* 40 Ford.L.Rev. 1 (1970); Note, *Remedies For Judicial Misconduct and Disability: Removal and Discipline of Judges,* 41 N.Y.L.Rev. 149 (1966); Note, *The Commission Removal Plan: A Corrective Remedy for Judicial Misconduct in Iowa,* 55 Iowa L.Rev. 1020 (1969).

The Supreme Court of Virginia concluded that these were matters involving a serious and substantial evil which did not require courtroom evidence to sustain their truth and validity. Considering these matters, the Court held that:

> "It can be said safely, without need of hard in-court evidence, that, absent a requirement of confidentiality, the Judicial Inquiry and Review Commission could not function properly or discharge effectively its intended purpose. Thus, sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings—the imminent impairment of the effectiveness of the Commission and the accompanying immediate threat to the orderly administration of justice." 217 Va. .....

III.

Virginia Code Section 2.1-37.13 Is Not Unconstitutionally Vague Or Overbroad.

In the Supreme Court of Virginia, Landmark argued that § 2.1-37.13 was ambiguous in that the word "divulge" as

used in the statute was susceptible to differing interpretations. Landmark urged that the statute should be construed to mean that a violation would occur only upon the first act of disclosure by an individual who had actually participated in some manner in the proceedings of the Commission.

This position was decided against Landmark by the Supreme Court of Virginia. In arriving at its decision, the Court interpreted the word "divulge" to mean to disclose or make known. *Black's Law Dictionary,* 567 (4th ed. 1951). Applying this interpretation to this case, the Supreme Court held that when Landmark published its article it disclosed or made known to the public at large information which was still confidential. The Virginia Supreme Court concluded that so far as was pertinent to this case, only upon the filing of a formal complaint by the Commission in the Virginia Supreme Court did the matter enter the public domain. The Court held that the proscription of the statute was so clear that it would be unreasonable to construe it to mean that only the participants in a Commission proceeding are subject to the proscribed sanctions or that only the first disclosure of confidential information was actionable.

In the area of examining state statutes for vagueness, this Court has said the doctrine is based on the principle that no person "shall be held criminally responsible for conduct for which he could not reasonably understand to be proscribed." *Colten* v. *Kentucky,* 407 U.S. 104, 110 (1972). "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." 407 U.S. at 110.

The statute in question provides that the proceedings before the Commission "shall be confidential and shall not be divulged by any person to anyone except the Commission" and further provides that "any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor." There is nothing in these words which in any way can be construed to restrict the provisions of this section to persons who are participants in Commission proceedings, and the Supreme Court of Virginia has so found. The very words themselves impart to a person of reasonable intelligence fair notice that no one may divulge information about Commission proceedings.

In discussing statutory construction, this Court in *Vermilya-Brown Co.* v. *Connell,* 335 U.S. 377 (1948), stated:

> "Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." 335 U.S. at 386.

To interpret the statute as contended for by Landmark would be to thwart its purposes and emasculate the Commission. The Virginia Supreme Court found that without confidentiality the Commission could not function properly or discharge effectively its intended purposes.

In its jurisdictional statement, Landmark also raises a vagueness issue as it relates to what materials are encompassed within the statute. This particular issue was not brought to the attention of the Supreme Court of Virginia and should not be considered by this Court. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969); *Hill* v. *California,* 401 U.S. 797 (1971).

CONCLUSION

In arriving at its decision in this case, the Supreme Court of Virginia has been sensitive to the commands of the First Amendment, and has balanced the competing interests in keeping with the decisions of this Court. In view of the reasons previously stated, the Commonwealth of Virginia submits that the judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Assistant Attorney General of Virginia, counsel for the appellee in the captioned matter and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 20th day of May, 1977, I mailed, first class postage prepaid, three copies of the foregoing Motion to Affirm to Floyd Abrams, Esquire, 80 Pine Street, New York, New York 10005, and Conrad M. Shumadine, Esquire, 2030 Virginia National Bank Building, Norfolk, Virginia 23510, attorneys for appellant.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

BRIEF OF APPELLANT

Opinions Below

The opinion of the Virginia Supreme Court dated March 4, 1977 is set forth in the Appendix at p. 55a and is reported at 217 Va. 699, 233 S.E.2d 120 (1977). The order of the trial court dated January 15, 1976 finding Landmark Communications, Inc. ("Landmark") guilty as charged and imposing a fine of $500 is set forth in the Appendix at p. 50a and is unreported.

Jurisdiction

On November 5, 1975, a grand jury in the Circuit Court of the City of Norfolk, Virginia returned a true bill indicting Landmark for having "unlawfully divulge[d]", in violation of Va. Code § 2.1-37.13, "the identification of a Judge of a Court not of record, which said Judge was the

subject of an investigation and hearing by the Judicial Inquiry and Review Commission." (JA 3)* Landmark moved to quash and dismiss the indictment alleging, *inter alia*, that Va. Code § 2.1-37.13 did not apply to Landmark's published article and that it could only be applied to Landmark in violation of the First Amendment to the United States Constitution. (JA 4) On December 10, 1975, the trial court overruled Landmark's motion to quash and dismiss the indictment (JA 48) and Landmark was tried before the court sitting without a jury. On January 15, 1976, the trial court found Landmark guilty as charged. (JA 50) On January 29, 1976, Landmark filed its Notice of Appeal and Assignments of Error alleging, *inter alia*, that Va. Code § 2.1-37.13 did not apply to Landmark's published article and that said section could only be applied to Landmark in violation of the First Amendment to the United States Constitution. On March 4, 1977, the Supreme Court of Virginia rendered its decision affirming Landmark's criminal conviction and rejecting its constitutional arguments.

A Notice of Appeal was filed on April 15, 1977. This Court noted probable jurisdiction on June 13, 1977.

Jurisdiction of this Court to review the decision of the Supreme Court of Virginia is conferred by 28 U.S.C. § 1257(2) (1970).

Questions Presented

(1) May a newspaper, consistent with the First and Fourteenth Amendments to the United States Constitution, be convicted and subjected to criminal sanctions for

* References to "JA—" are to the appropriate pages of the Appendix agreed upon by the parties to this action and filed with this Court.

its publication of truthful statements concerning a public official in connection with his public duties?

(2) Assuming, *arguendo*, that a newspaper may ever be convicted and subjected to criminal sanctions for such a publication, may it, consistent with the First and Fourteenth Amendments to the United States Constitution, be convicted and subjected to criminal sanctions under Va. Code § 2.1-37.13 in the absence of factual proof adduced in evidence proving beyond a reasonable doubt that its publication of a truthful report concerning the investigation of a named judge by a state judicial commission constituted a clear and present danger to the administration of justice?

(3) Is Va. Code § 2.1-37.13, as interpreted by the Supreme Court of Virginia, unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution?

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Article VI, § 10 of the Constitution of Virginia provides, in part:

"The General Assembly shall create a Judicial Inquiry and Review Commission consisting of members of the judiciary, the bar, and the public and vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge. The Commission shall be authorized to conduct hearings and to subpoena witnesses and documents. Proceedings before the Commission shall be confidential.

"If the Commission finds the charges to be well-founded, it may file a formal complaint before the Supreme Court.

"Upon the filing of a complaint, the Supreme Court shall conduct a hearing in open court and, upon a finding of disability which is or is likely to be permanent and which seriously interferes with the performance by the judge of his duties, shall retire the judge from office. A judge retired under this authority shall be considered for the purpose of retirement benefits to have retired voluntarily.

"If the Supreme Court after the hearing on the complaint finds that the judge has engaged in misconduct while in office, or that he has persistently failed to perform the duties of his office, or that he has engaged in conduct prejudicial to the proper administration of justice, it shall censure him or shall remove him from office."

Sections 2.1-37.1 through 2.1-37.18 of the Code of Virginia provide for the establishment, nature of and rules relating to the Virginia Judicial Inquiry and Review Commission (the "Commission"). Section 2.1-37.13 provides, in relevant part, as follows:

"All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11 ['Order compelling witness to attend and testify'], 2.1-37.12 ['Depositions']), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character . . . .

"All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal, shall be kept in the confidential files of the Commission.

"Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."

The term "divulge" is not defined in the Code of Virginia.

Pursuant to Va. Code § 18.2-11(a), a misdemeanor may be punished by imprisonment for up to 1 year and a fine of up to $1,000.

Statement of the Case

(a) *Matters Leading to the Noting of Probable Jurisdiction*

On October 4, 1975, *The Virginian-Pilot*, a newspaper published by Landmark, printed on the first page of its second section an article which accurately identified and reported about a judge who had been investigated by the Commission. The article stated that "[n]o formal complaint has been filed by the commission" against the judge, "indicating either that the five-man panel found insuffi-

cient cause for action or that the case is still under review." (JA 47)

On November 5, 1975, Landmark was indicted by a Grand Jury of the Circuit Court of the City of Norfolk for the publication of the October 4 article. The Grand Jury charged that Landmark "did unlawfully divulge the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing" by the Commission. (JA 3)

Trial was had on December 10, 1975, after the denial by the trial court of Landmark's motion to quash and dismiss the indictment. (JA 48) The only evidence introduced by the Commonwealth (other than the charter, articles of amendment, last annual report of Landmark and the October 4, 1975 issue of *The Virginian-Pilot*) was a Stipulation of Evidence stating that Landmark was a Virginia corporation which publishes *The Virginian-Pilot;* that on October 4, 1975, Landmark published an article which identified a judge who had been investigated by the Commission; and that at the time of the publication of the article, the Commission had not filed a formal complaint concerning the judge with the Supreme Court of Virginia. (JA 6)

The only witness who testified at the trial was Joseph W. Dunn, Jr., Managing Editor of *The Virginian-Pilot*. He testified that he made the decision to publish the article because (1) a complaint had been filed against the judge many months prior to the hearing before the Commission and (2) the news was of such importance that it should be brought to the attention of the public. Mr. Dunn stated that he was aware that it was a misdemeanor for individuals who participated in the proceedings before the Commission to reveal information concerning the proceedings, but that he had not understood the statute to apply to newspaper reports about proceedings before the Commission. He further testified that no reporter, employee or agent of Landmark had been subpoenaed before or otherwise participated in the proceedings before the Commission. (JA 42-43)

On January 15, 1976, the trial court found Landmark guilty as charged. Its Order did not deal with, or even refer to, the statutory and constitutional arguments made by Landmark. Instead, the Order simply concluded that "the Court doth find the defendant Guilty as charged," fixing punishment at $500 and requiring Landmark to pay the costs of prosecution. (JA 50)

The March 4, 1977 decision of the Supreme Court of Virginia affirming the conviction of Landmark by a 6-1 vote characterized the case as involving a "confrontation" between the First Amendment and Va. Code § 2.1-37-13. (JA 55) After holding that the statute "[c]learly" applied to Landmark and extended to "all information concerning a proceeding before the Commission," the Court dealt with the direct confrontation between the statute as so interpreted and the First Amendment, acknowledging that the matter was "serious" and "important" and that it presented "an issue not decided previously by this Court, or so far as our research discloses, by any other appellate court in this country." (JA 59-60)

Viewing the case as one involving "subsequent punishment" rather than prior restraint—a conclusion with which we do not quarrel on this appeal—the Court purported to apply a clear and present danger test in the following fashion: it conceded that Landmark could not be punished for "publishing the confidential information contained in the article" unless the revelation created "a clear and

present danger to . . . the orderly administration of justice"; it held that the statute itself, one of 35 in the nation requiring confidentiality with respect to judicial inquiry commissions,* constituted an appropriate finding of such danger; and it conceded that no evidence had been adduced at trial that publication of the October 4, 1975 news article in *The Virginian-Pilot* constituted a clear and present danger to the administration of justice. The "requirement of confidentiality in Commission proceedings," the Court held:

> "(1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious." (JA 72-73)

Concluding that "sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings" (JA 73), the Court upheld the statute's constitutionality and affirmed the conviction.

Justice Poff dissented, concluding that the statute "should be construed not to apply to this defendant under these circumstances" and that "[c]onstrued otherwise, the statute offends the First Amendment." (JA 74)

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* The number was based on information set forth in the publication of the American Judicature Society entitled *Judicial Disability and Removal Commissions, Courts and Procedures* (G. R. Winters & R. S. Lowe, eds. 1973). As of the writing of this brief, over 40 jurisdictions have adopted some form of judicial review procedures. A listing of the applicable provisions is set forth at pp. 39n-40n, *infra*.

On April 15, 1977, Landmark filed a Notice of Appeal to this Court. Landmark's Jurisdictional Statement was filed on April 20, 1977. A Motion to Affirm the Judgment of the Supreme Court of Virginia was served by the Commonwealth of Virginia on May 20, 1977. A Supplemental Brief, setting forth certain new factual developments, was filed by Landmark on June 3, 1977. This Court noted probable jurisdiction on June 13, 1977.

(b) *Events Subsequent to the Noting of Probable Jurisdiction*

Since this Court noted probable jurisdiction, several events involving enforcement of Va. Code § 2.1-37.13 have occurred. We bring these matters to the Court's attention for informational purposes.

On June 16, 1977, an Associated Press dispatch received by *The Virginian-Pilot* reported that a Virginia judge, who previously had been investigated by the Commission, had discharged a court clerk who had testified against the judge before the Commission. The Associated Press report also indicated that a new investigation had been commenced by the Commission relating to these circumstances.

Under the terms of a preliminary injunction previously entered by United States District Judge Warriner, Richmond Newspapers, Inc., the publisher of two Richmond, Virginia newspapers, was free to publish information concerning activities of the Commission without fear of prosecution for violation of § 2.1-37.13.* The editors of *The*

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* The preliminary injunction resulted from one of several federal actions instituted by publishers other than Landmark in the wake of the decision of the Virginia Supreme Court in this matter. On March 12, 1977, eight days after the filing of the decision of the Virginia Supreme Court, United States District Judge Robert R. Mehrige, Jr. issued a temporary injunction restraining prosecu-

Virginian-Pilot considered the Associated Press story to be highly newsworthy, and were aware that the story had

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tion of a Virginia television station under the section of Virginia law passed upon by the Virginia Supreme Court and at issue on this appeal. *Nationwide Communications, Inc.* v. *Backus*, No. 77-0139-R (E.D. Va. March 15, 1977). The order expired by its own terms without further proceeding.

An order to enjoin a then pending prosecution of Richmond Newspapers, Inc. was denied on March 31, 1977 by United States District Judge D. Dortch Warriner, who stated that although he believed the statute was unconstitutional, he could not find it "patently and flagrantly unconstitutional" in light of the decision of the Virginia Supreme Court. *See Norfolk Ledger-Star*, April 6, 1977, p. A8. On April 29, 1977, Richmond Newspapers, Inc. was convicted of two violations of Va. Code § 2.1-37.13 and fined $1,000 for each violation.

On May 3, 1977, the prosecution of Richmond Newspapers, Inc. having been concluded, a temporary restraining order was entered by Judge Warriner restraining further prosecution of Richmond Newspapers, Inc. under that statute; this order was extended on May 12, 1977 and a preliminary injunction (which remains in effect) against any such prosecution of Richmond Newspapers, Inc. was entered on May 20, 1977. (SB 1a, 8a, 10a)

In granting the preliminary injunction, Judge Warriner referred to:

> "the loss to the citizens of Virginia of the opportunities of knowing what disciplinary actions are contemplated, what investigations are being made, what is being done about bad judges. They have a right to know, and a deprivation of that right is surely as damaging to the body politic of Virginia as the inconvenience that was found in the Maynard case to warrant Federal intervention there." (SB 20a-21a)

He further observed that:

> "Surely it is newsworthy that a judge is being investigated. Surely it's newsworthy that a judge is being disciplined by reprimand, informal or otherwise. That's newsworthy. And if the newspaper doesn't print that news, then it can be said that it is printing the opposite; it is saying the opposite. And in that sense, the newspaper is being forced by the State not only to say something it doesn't want to say but to say something that isn't true and thus is misleading the citizenry." (SB 21a-22a)

(References to "SB—" in this footnote are to pages of the Supplemental Brief filed by Landmark with this Court on June 3, 1977.)

been reported in other parts of the state. Nevertheless, not being protected by the explicit terms of the federal injunction (which referred only to Richmond Newspapers, Inc.), and in deference to the opinion of the Supreme Court of Virginia, they determined that it was inappropriate to print the story without a federal court order prohibiting prosecution for such reporting.

Accordingly, Landmark commenced an action by seeking a temporary restraining order against prosecution with respect to its reporting of such matters.* On June 17, 1977, an order was signed by United States District Judge J. Calvitt Clarke, Jr. enjoining such prosecution providing "the substance of such information has been published by the *Richmond Times Dispatch* or *News Leader* [publications of Richmond Newspapers, Inc.] or provided the plaintiffs have been assured that such information will be published by either of such newspapers." The order expired on June 20, 1977 and Judge Clarke refused to extend it beyond that date.

On June 21, 1977 the discharged court clerk brought suit against the judge in question, alleging that her testimony against him had been the reason for the discharge.** In light of the public nature of these charges, Landmark deemed further prosecution of its action before Judge Clarke to be unnecessary and has therefore requested leave to discontinue its action.

Summary of Argument

This case involves the effort of a state to punish the accurate reporting of information with respect to the fit-

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* *Landmark Communications, Inc., et al.* v. *Campbell*, No. 77-404-N (E.D. Va., filed June 17, 1977).

** *De Voe* v. *Turner, et al.*, No. 77-0341-R (E.D. Va., filed June 21, 1977).

ness of a public official for his position and the functioning of government itself. As interpreted by the Virginia Supreme Court, Va. Code § 2.1-37.13 makes criminal the reporting, at any time, of any information concerning proceedings before the Commission unless and until a formal complaint is filed against the judge; if no such complaint is filed, not a word about the matter may ever be published.

This Court has recently recognized that even commercial speech about lawful activities may not be suppressed, so long as it is true. When, as here, the reporting concerns the qualifications of government officials and the basic functioning of our system of government, criminal punishments for such reporting may not be countenanced. In Part I of this brief, it is urged that the First and Fourteenth Amendments preclude the imposition of criminal penalties on truthful reporting about public officials in the performance of their public duties.

Part II of this brief proceeds on the assumption, *arguendo,* that truthful speech of the sort described above could, at least in some circumstances, be punished. While the most appropriate standard, short of that set forth above, to apply to pure expression in such a case remains a subject of dispute, the clear and present danger test has been applied on occasion to cases where the interest alleged to be arrayed against the First Amendment was the protection of judicial administration. That test provides the minimum protection for free expression which may be permitted under any theory of the First Amendment. Judged by even that test, the statute is unconstitutional.

The Virginia Supreme Court identified three aspects of judicial administration which it believed were to be protected by Va. Code § 2.1-37.13: 1) preservation of the

reputation of individual judges; 2) maintenance of confidence in the judicial system; and 3) protection of witnesses before the Commission against reprisal by those under investigation. (JA 72-73) This Court has previously rejected the adequacy of the first two interests as a basis for suppressing expression. The third interest cannot, in any sense, be deemed imperiled on the facts of this case since no witnesses were identified in the disputed newspaper report. The statute is, moreover, far broader than necessary to protect any such interest. Further, whether or not the third interest is entitled to some weight as a general matter, it may be entitled to no weight with respect to the Virginia review procedures, since, under those procedures, a judge who is the subject of an investigation is likely, in any event, to learn of the identity of witnesses who have testified against him. Indeed, as actual events in Virginia have shown, press coverage of Commission proceedings has provided witnesses with protection against the risk of reprisals.

The clear and present danger test cannot be satisfied here, in any event, since no evidence whatever was adduced at trial with respect to the seriousness of the evils adverted to by the Virginia Supreme Court or their supposed immediacy under the circumstances of this case. Mere reference to the fact that legislation was adopted is insufficient to support a finding of clear and present danger, especially when—as here—the legislative history reflects no finding at all of the existence of any such danger.

In Part III, it is urged that Va. Code § 2.1-37.13 is both unconstitutionally vague and overbroad. In prohibiting divulgence of information about proceedings before the Commission, the legislature failed to make clear any intent to reach a newspaper's reporting of information given to

it by others. Further, as interpreted by the Virginia Supreme Court, the statute leaves open a number of critical questions relating to both the nature and scope of material to which the protection extends. As to the latter point, a potential critic of the judicial system is left to ponder the scope of any restriction which extends to "all information concerning a proceeding." (JA 59) Any such standard is unacceptably vague.

The language of the statute as interpreted also covers a variety of activities—including petitioning the legislature for relief, the filing of lawsuits and criticism of Commission procedures generally—which must be protected under any view of the First Amendment. In this respect, Va. Code § 2.1-37.13 is plainly overbroad and therefore unconstitutional on its face, even if it were not otherwise unconstitutional as applied to Landmark.

ARGUMENT

I.

The First Amendment Forbids the Imposition of Criminal Sanctions on a Newspaper for the Publication of Truthful Information About Public Officials With Respect to the Performance of Their Public Duties

This case raises anew a question which penetrates to the core of our concept of self-government. It is nothing less than whether the press may be punished for printing the truth about a public official in connection with his public duties. It is an old question—dating back to the Zenger trial itself—and it is one we believe this Court has long since answered.

The Virginia statute at issue in this case does not proscribe conduct; nor does it purport to limit the time, place or manner of expression. The statute is in the classic mold of unconstitutional acts: it proscribes expression itself, based solely on the content of that expression.

This Court has recognized that "[t]he constitutional guarantees of freedom of speech forbid the states to punish the use of words or language not within 'narrowly limited classes of speech.' *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571 (1942)." *Gooding* v. *Wilson*, 405 U.S. 518, 521-22 (1972). The classes (referred to in *Chaplinsky*) were said to include: "the lewd and the obscene, the profane, the libelous and the insulting or 'fighting' words." 315 U.S. at 572. Punishment of expression in such situations was only tolerated because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* Here the Virginia statute forbids not merely the taking of a "step to truth," but the dissemination of truth itself; it punishes speech which is not merely of "social value" but which is essential to self-government. No theory of the First Amendment can permit such a statute to stand.*

It is an accepted principle of our jurisprudence that:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern, without previous restraint or fear of subsequent punishment." *Thornhill* v. *Alabama*, 310 U.S. 88, 101-02 (1940)

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* The First Amendment is, of course, applicable to the states through the Fourteenth Amendment. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 556 (1976).

So basic is the principle that truthful speech must be protected that, in a series of recent decisions, it has been applied to even the most mundane of commercial transactions. A state has thus been held to be constitutionally forbidden from "completely suppress[ing] the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976).

In that case the Court contrasted the "highly paternalistic approach" of the state in keeping its citizens in ignorance of information as to drug prices which the state thought might be used by its citizens against their own best interests, with a policy that recognized that:

> "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communications rather than to close them." 425 U.S. at 770

The Court concluded:

> "[T]he choice among these alternative approaches is not ours to make or the Virginia General Assembly's. *It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.*" *Id.* (emphasis added)

The Court spoke similarly in its recent decision in *Linmark Associates, Inc.* v. *Township of Willingboro*, 45 U.S.L.W. 4441 (U.S. May 2, 1977). After noting that the statute in *Virginia Pharmacy* was unnecessary to protect the state interests involved, the Court set forth the more

fundamental premise of its decision in that case. "[I]n any event, the First Amendment disabled the State from reaching its goal by restricting the free flow of truthful information." 45 U.S.L.W. at 4444. The Court went on to reject a variety of professed justifications for the restrictions on commercial speech in holding that the First Amendment barred commercial sanctions which had the effect of "restricting the free flow of truthful information." *Id.*

In yet another recent decision in this series of commercial speech cases, *Bates* v. *State Bar*, 45 U.S.L.W. 4895 (U.S. June 27, 1977), the Court held unconstitutional bar association restrictions on truthful advertising of routine legal services. Such disagreement as there was on the Court related principally to differing assessments as to the accuracy of the particular advertisements at issue in that case and the accuracy of legal advertising generally.

In all these recent cases,* this Court identified a number of substantial interests requiring protection of truthful commercial speech, including some which the Court recognized as relevant to "public decision-making in a democracy." *Virginia Pharmacy*, 425 U.S. at 765. The Court also recognized that although commercial speech is entitled to First Amendment protection, "a different degree of protection" may be appropriate to commercial speech than is due "news reporting or political commentary." *Id.* at 772 n. 24. It thus does not denigrate the recently vindicated values of commercial speech to say that the right to publish concerning matters more intimately connected with self-government has, if anything, a still stronger and clearer call on the protections of the First Amendment. That such greater protection arises out

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* *See also Carey* v. *Population Servs. Int'l*, 45 U.S.L.W. 4601 (U.S. June 9. 1977).

of the nature of our system itself makes all the more extraordinary Virginia's efforts to punish the dissemination of the truthful information at issue on this appeal.

The Court has often recognized the centrality of the First Amendment's protection of expression about government and government officials. *See New York Times Co.* v. *Sullivan,* 376 U.S. 254, 274-75 (1964). Indeed, the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U.S. 476, 484 (1957). As eloquently set forth by Justice Brandeis in his concurring opinion in *Whitney* v. *California,* 274 U.S. 357, 375-76 (1927):

> "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Inherent in these concepts of the First Amendment is an understanding that ours is a form of government in

which "the censorial power is in the people over the government, and not in the Government over the people." Madison, in 4 Annals of Cong. 934 (1794), quoted in *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 275. The consequence of this understanding for liberty of the press is set out most clearly in this Court's decisions in *New York Times Co.* v. *Sullivan, supra* and *Garrison* v. *Louisiana,* 379 U.S. 64 (1964).

In *Sullivan* this Court recognized a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open". 376 U.S. at 270. It took as a starting point the imperative need to protect truthful criticism of official action. But it recognized that a rule which protected *only* truth was insufficient since:

> "[u]nder such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true, and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." 376 U.S. at 279

Adoption by the Court of the actual malice test was the result, a result animated by the conclusion that even some false expression must be protected in order to avoid dampening the expression of that which is true.*

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* More recent opinions concluding that civil libel laws may not be used by a public official or public figure to recover damages arising from the publication of true statements about him include *Time, Inc.* v. *Firestone,* 424 U.S. 448, 458 (1976) and *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 498-500 (1975) (Powell, *J.,* concurring).

Garrison confronted similar issues in the context of criminal libel. There, the defendant was convicted of the crime of libeling the judges of a state court bench. This Court applied the *Sullivan* rule and reversed the conviction, stating:

> "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' *New York Times Co.* v. *Sullivan*, 376 U.S., at 270." 379 U.S. at 74-75

Reviewing the history of criminal libel prosecutions and the gradual acceptance of the defense of truth as necessary to a democratic society, the Court concluded that:

> "In any event, where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." *Id.* at 72-73

Recognizing the fundamental values at stake, the Court set forth the principle which governed its decision:

> "Truth may not be the subject of either civil or criminal sanctions where the discussion of public affairs is concerned." *Id.* at 74*

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* *See also Thornhill:*

"[T]he group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." 310 U.S. at 104

Additionally, in *Wood* v. *Georgia*, 370 U.S. 375 (1962), the Court analyzed a Georgia contempt conviction based on out-of-court statements allegedly posing a threat to judicial administration. It noted the rejection as irrelevant by the state courts of defendant's efforts to prove the truth of the out-of-court statements for which he was punished. "If the petitioner could be silenced in this manner the problem to the people in the State of Georgia and indeed in all the States becomes evident." 370 U.S. at 391.

The same principle governs this case.*

In a sense, the underlying thrust of this type of statute or of any statute which protects government officials from truthful statements about their conduct is akin to the concept of seditious libel designed to protect governmental institutions against threats posed by criticism. Our nation's only—and quite sufficient—experience with such law was the Sedition Act, Ch. 73, 1 Stat. 596 (1798). The Act subjected to criminal sanction any writing or speech which was "false, scandalous and malicious" and was uttered with an intent, *inter alia*, to bring specified public officials "into contempt or disrepute; or . . . excite against them . . . the hatred of the good people of the United States." Truth

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* In crucial respects, the specific interests at stake in this case parallel those at issue in *Garrison*. There the Court rejected the protection of reputational interest as justification for any imposition of criminal sanctions on truthful speech or, indeed, any false statement not made with constitutional malice. It did so despite the fact that such sanctions had traditionally been viewed as a deterrent to a breach of the peace—at least as strong an interest as that said to be involved here. Since on the facts of this case, *only* reputational interests (whether individual or judicial) are at stake, the holding of *Garrison*, quite apart from its more general language, compels reversal.

Like *Sullivan* before it, *Garrison* also makes clear that even complete protection for the publication of truthful information may not suffice fully to protect First Amendment interests. In this case, the Court need not reach the question of the degree to which *untruthful* speech need be protected in order to avoid the risk of inhibiting truthful speech in a non-libel context.

was a defense, a concession not made by the Virginia legislature.

History—and this Court—have since judged the Sedition Act and found it unconstitutional. *Sullivan*, 376 U.S. at 273-76. Indeed, one commentator has suggested that "the presence or absence in the law of the concept of seditious libel defines the society. A society may or may not treat obscenity or contempt by publication as legal offenses without altering its basic nature. If, however, it makes seditious libel an offense, it is not a free society no matter what its other characteristics." Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 Sup. Ct. Rev. 191, 205.

While the intent of the statute in question here may not be to stifle criticism of government, that is the clear effect of the statute. As Professor Kalven noted, no state interest can justify such a statute in a free society. Indeed, the enduring contribution of *Sullivan* and its progeny may well be the recognition that any legal test which burdens truthful speech relating to public officials based on the content of such speech is simply unacceptable. The statute at issue in this case does not simply inhibit such speech; it prohibits it.

Under the statute, journalists or publishers could be fined or imprisoned if they ever printed the fact that an unfit judge who had been accused before the Commission was still sitting, or that an unfit—or corrupt—Commission had covered up for the judge. And, as in this case, the mere accurate reference in a news article to the name of a sitting judge against whom charges had been filed would be criminal—notwithstanding the recent admonition in Justice Brennan's concurring opinion in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 587 (1976) that:

> "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability."

A multitude of hypothetical examples of the dangers posed by the Virginia statute could be offered, but those dangers are most starkly illustrated by two actual events which occurred shortly after the noting of probable jurisdiction in this case.

As noted above (pp. 9-11), the Associated Press reported that a sitting judge of Virginia, who had been the subject of an investigation by the Commission, had fired a court clerk who had given testimony against the judge before the Commission. It also reported that a new investigation had been convened to investigate the firing. Absent the issuance of the temporary restraining order by Judge Clarke, Landmark would have been forbidden, upon pain of criminal sanctions, from informing its readers of these facts, facts vital to any evaluation of the fitness of the judge, the Commission itself, and the workings of the justice system generally.

Additionally, late in June, a Justice of the Texas Supreme Court was indicted for perjury and forgery and accused of (but not indicted for) plotting to murder a

former business associate. In the wake of these allegations, it was also reported that the Texas State Judicial Qualification Commission would convene a hearing on the various charges against the Justice in question.* If the same events had occurred in Virginia, not a word about the prospective proceeding could have appeared in the state's newspapers.**

No theory of the First Amendment would sanction criminal prosecution for the publication of information concerning either of these investigations. As Mr. Justice Black stated:

> "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government." *New York Times Co.* v. *United States,* 403 U.S. 713, 717 (1971) (Black, J., concurring)***

* The New York Times, July 1, 1977, p. A8, col. 5.

** Significantly, Texas has a constitutional provision requiring proceedings before that Commission to be confidential. Texas Const. Art. 5, § 1-a(10). The Texas Commission either did not consider the disclosure to be a violation of its laws or concluded that the paramount interest in assuring the public that an investigation was underway required disclosure.

*** The vital role which the press plays in reporting on and thereby checking governmental excess has long been recognized by this Court. In *Mills* v. *Alabama,* 384 U.S. 214 (1966), the Court observed that: "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote

To agree with Mr. Justice Black that the protected role of the press is to "bare the secrets of government and inform the people" need not, of course, be to preclude government from striving, by control of its own personnel, to retain those secrets.* But, as Alexander Bickel wrote:

> "[G]overnment may guard mightily against serious but more ordinary leaks, and yet must suffer them if they occur. Members of Congress as well as the press may publish materials that the government wishes to, and is entitled to, keep private. It is a disorderly situation surely. But if we ordered it we would have to sacrifice one of two contending values—privacy or public discourse—which are ultimately irreconcilable. If we should let the government censor as well as withhold, that would be too much dangerous power, and too much privacy. If we should allow the government neither to censor nor to withhold, that would provide for too little privacy of decision-making and too much power in the press and in Congress." A. Bickel, *The Morality of Consent* 80 (1975)

Precisely the same, we believe, may be said of this case. The Commission may withhold and keep secret what it

to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." 384 U.S. at 219. *See also* Stewart, *"Or of the Press,"* 26 Hastings L.J. 631, 634 (1975).

* Control of Court personnel is thus available to preserve the secrecy of this Court's deliberations. *Cf. New York Times Co.* v. *United States, supra,* 403 U.S. at 752 n.3 (Burger, C.J., dissenting). *See also City of Madison* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167, 178 (1976) (Brennan, J., concurring).

This case does not, of course, raise questions as to the right of the press to obtain access to governmental documents.

can; the press may print what it learns.* *See generally* Stewart, *"Or of the Press,"* 26 Hastings L.J. 631 (1975). To the extent Va. Code § 2.1-37.13 is read to the contrary, as it was by the Supreme Court of Virginia, it is unconstitutional.

II.

Assuming, *Arguendo*, That Truthful Reporting About Public Officials in the Performance of Their Public Duties May Ever Be Punished, No Clear and Present Danger Exists Justifying Such Punishment Under This Statute

Few areas of the law have stirred as much dispute as the attempts of the courts to reconcile the explicit language of the First Amendment with legislatively or judicially perceived needs for restrictions on the rights of free expression. Where, as here, government regulation is aimed directly at speech, rather than action, and where the speech is tied so directly to the process of governing, the rule set forth in *Garrison* that "[t]ruth may not be the subject of . . . criminal sanctions where the discussion of public affairs is concerned" (379 U.S. at 74), seems to us much the most appropriate. Under that test, of course, the Virginia statute would be flatly unconstitutional. We believe, however, that judged by any of the other approaches employed by this Court in recent years

* We recognize, as did Professor Bickel, the limitations on this principle which may arise in the unique circumstances discussed in *New York Times Co.* v. *United States, supra*. Issues of national security, that is, matters which relate to the survival of our nation, have been accorded a distinct status in our jurisprudence. *See Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931). They are so far removed from the present context that we believe they need not be considered here in formulating a rule applicable to the broad range of state regulatory action which does not touch upon such matters.

the statute, both on its face and as applied here, would, as well, be unconstitutional.

Where First Amendment rights are directly threatened, this Court will engage in the most exacting scrutiny of the legislation. *See Buckley* v. *Valeo*, 424 U.S. 1, 64-65 (1976); *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). "The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976).

No one rule short of that set forth in *Garrison* seems to take full account of these requirements. Perhaps the single standard which has most often been used—and as often condemned by members of this Court itself and legal commentators—in evaluating restrictions on First Amendment rights is some form of clear and present danger test. First articulated by Justice Holmes in *Schenck* v. *United States*, 249 U.S. 47, 51-52 (1919), the standard has been employed in the quartet of contempt cases in which an attempt was made to sustain contempt convictions based on out-of-court writings on the ground that such expression constituted an unacceptable threat to the administration of justice. *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941).* The Virginia Supreme

* The language at issue about the judiciary in those cases was in many respects offensive and in some untrue. The editorials at issue in *Bridges* (entitled "Probation for Gorillas?") all but demanded that probation not be granted to two union members who had been found guilty of assault (314 U.S. at 271-72); the cartoon and editorial at issue in *Pennekamp* "wondered"—in a fashion which this Court agreed was unfair—whether the courts were being "subverted into refuges for lawbreakers" (328 U.S. at 337 n.4);

Court purported to base its analysis on this standard as well.

While we again emphasize our belief that this standard does not provide adequate protection against a statute aimed at truthful reports about public officials, we believe that analysis of the present statute and of the facts of this case under such a standard reveals the patent unconstitutionality of the statute and the need for reversal here.

A. *The Evils the Virginia Statute Would Protect Against Do Not Justify Restrictions on Truthful Reporting and Cannot Satisfy the Clear and Present Danger Test*

In affirming the conviction of Landmark, the Virginia Supreme Court identified three interests which it believed were served by the "requirement of confidentiality in Commission proceedings." The Court held that such confidentiality:

> "(1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious." (JA 72-73)

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the editorials in *Craig*, during the pendency of a motion for a new trial, accused the elected layman judge of "arbitrary action" and of committing a "travesty on justice" in his earlier rulings which he was then reconsidering (331 U.S. at 379-80); and the offending language in *Wood* accused a judge of charging a then sitting grand jury "in the style and language of a race baiting candidate for political office" (370 U.S. at 380). All these cases involved the articulation of harsh opinions about the judiciary—not, as in this case, the statement of uncontestedly accurate facts.

Concluding that "sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings" (JA 73), the Court upheld the statute's constitutionality and affirmed the conviction.

One need not quarrel with the legislative goals adverted to by the Court to suggest the inadequacy of such interests to support criminal sanctions for truthful reporting with respect to investigations of judges by the Commission.

The first and second interests—the protection of a judge's reputation and the need to preserve confidence in the judiciary as a whole—are obviously closely related. These interests are significant; but they are wholly insufficient to support sanctions on truthful reporting about individual judges or the judiciary as a whole. As we have observed, preservation of judicial reputation has been held to be an inadequate basis for criminal punishment of speech or reporting, at least absent proof of falsity and of constitutional malice, neither of which is alleged here. The Court in *Sullivan* stated that: "Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error." 376 U.S. at 272.* *And see Garrison* v. *Louisiana, supra.*

This Court has also shown a healthy disbelief for the proposition that respect for the judiciary as an institution can be encouraged by silencing potential critics.

> "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public

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* Indeed, as this Court noted in *Craig* v. *Harney*, 331 U.S. at 376:

"Judges are supposed to be men of fortitude, able to thrive in a hardy climate."

> opinion. . . . [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." *Bridges* v. *California*, 314 U.S. at 270-71

It is noteworthy that Mr. Justice Frankfurter, dissenting from the reversal of the conviction for contempt in *Bridges*, did so on a basis wholly inconsistent with that articulated by the Virginia Supreme Court in upholding this statute. He stated:

> "The purpose, it will do no harm to repeat, is not to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed. The purpose is to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal." *Id.* at 291-92 (Frankfurter, J., dissenting)

The Virginia statute, however, seeks not to protect the rights of litigants before the judges (a matter dealt with at length in this Court's recent *Nebraska Press Ass'n* ruling), but the reputational and institutional interests of judges themselves. This is simply not a purpose which

may be achieved at the price of penalizing First Amendment interests.

Only the third of the Virginia Supreme Court's justifications for the statute remains. The protection of witnesses against retribution for appearing before the Commission is indeed a significant interest. It is, however, not even directly implicated in this case which involves the identification of a judge and not a witness against him. And the statute appears, in any event, ill-designed to serve that interest.

The statutory scheme itself appears to defeat the goal. It apparently* provides the judges with access to the testimony of the witnesses against him even at the preliminary Commission stage. *See, e.g.*, § 2.1-37.12.** While this clearly protects the rights of the judge, it does undercut any protection as to the identity of witnesses and makes them potential targets of retribution if a judge is so inclined. That such possibility exists is, in fact, illustrated by the allegation referred to above that a judge ordered the dismissal of a court clerk for testifying against him at a Commission hearing. Press coverage of the dismissal, logically, would seem to represent a check on this danger apparently inherent in the legislative approach itself. Under the statutory scheme, however, a witness or a court official harassed by a judge as a result of testimony given

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* One problem posed by the Virginia statute is that the criminal sanction on disclosure of information makes it all but impossible to examine the procedures actually used in proceedings before the Commission.

** This section requires that any depositions, for example, be taken in a manner acceptable to the judge or his counsel. If agreement as to this cannot be reached, recourse to the courts may be had. While it seems implicit that the judge and his counsel may have access to the deposition itself, it is, at any rate, made explicit that in any dispute as to the manner of taking the deposition, the court record shall reveal the name of the witness.

before the Commission would be precluded from revealing this fact to the newspapers or anyone other than the Commission—a practice hardly calculated to protect such witnesses. Thus, even if a reference to witnesses had been made here, as it was not, the protection of witnesses against retribution could hardly be a basis for sustaining the statute.*

The restriction on reporting is, additionally, far from the narrowest means of protecting witnesses. Lawyer-witnesses might be protected by disqualification rules as to judges under investigation; other witnesses might be protected by monitoring programs. Thus the restriction on expression is not even "necessary to avoid the danger." *Dennis* v. *United States,* 341 U.S. 494, 510 (1951). And, the failure to use the least restrictive means to accomplish the legislative goal itself dooms any statute. *Buckley* v. *Valeo,* 424 U.S. 1, 25 (1976); *Dunn* v. *Blumstein,* 405 U.S. 330, 343 (1972); *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). As this Court stated in *Kusper* v. *Pontikes,* 414 U.S. 51, 59 (1973):

> "[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. . . . 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. . . .' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties."

* It is difficult to comprehend why, in any event, witnesses require less protection once public charges are filed against a judge. Certainly to the extent it is assumed that publicity attending the filing of charges before the Supreme Court would deter recriminations, the same rationale would impel more—not less—publicity at earlier stages when witnesses are more vulnerable.

Thus the gravity of the evil the statute would protect against, as set forth by the Virginia Supreme Court, is insufficient to allow the statute to survive a clear and present danger test even if the imminence of such threatened evil were great. In fact, however, neither the imminence of the danger nor the substantiality of the evil were established by evidence here and this fact itself renders application of the statute unconstitutional.

B. *No Finding of an Imminent Danger May Be Made Here in the Absence of Any Evidentiary Record to Support Such a Conclusion*

There is a further infirmity in any attempt to sustain the conviction here under any formulation of a clear and present danger test.* At the very least, application of that test requires proof of *actual* facts that the specific expression in question created a danger of such immediate and grave magnitude that it could be punished. "[T]he likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press." *Bridges,* 314 U.S. at 262. This Court in *Craig* left no doubt concerning the standards:

> "The fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." 331 U.S. at 376

* The conclusion of the Supreme Court of Virginia as to the existence of a clear and present danger is in no sense binding on the Court. Precisely such a conclusion was rejected by this Court, in the strongest terms, in *Wood.* More recently, this Court has overruled such findings of state supreme courts in *Nebraska Press Ass'n* v. *Stuart, supra* and *City of Madison* v. *Wisconsin Employment Relations Commission, supra.*

By no interpretation can the Commonwealth's evidence be deemed to establish by actual facts that the publication of the judge's name and the fact he had been investigated constituted a clear and present danger to the administration of justice, which danger was substantial and imminent. Indeed, the opinion of the Virginia Supreme Court concedes as much. (JA 66)

In this Court's scathing denunciation of a state court's failure to produce evidence and the trial court's failure to make any findings or to give any reasons how the statements in *Wood* actually interfered with the administration of justice, the Court stated:

> "Despite its conclusion that the petitioner's conduct created a serious evil to the fair administration of justice, the Court of Appeals did not cite or discuss the *Bridges, Pennekamp* or *Harney* cases, nor did it display an awareness of the standards enunciated in those cases to support a finding of clear and present danger. It simply adopted as conclusions of law the allegations made in the contempt citation. The court did not indicate in any manner *how* the publications interfered with the grand jury's investigation, or with the administration of justice. Unlike those cases in which elaborate findings have been made to support such a conclusion, this record is barren of such findings. The prosecution called no witnesses to show that the functioning of the jury was in any way disturbed; no showing was made that the members of the grand jury, upon reading the petitioner's comments in the newspapers, felt unable or unwilling to complete their assigned task because petitioner 'interfered' with its completion. There is nothing in the record to indicate that the investigation was not ultimately successful or, if it was not, that the petitioner's conduct was

> responsible for its failure. . . . What interference to petitioner's hearing or what harm this assertion might inflict on the administration of justice is not stated in the opinion. Nor is there any evidence of either in the record.
>
> "Thus we have simply been told, as a matter of law without factual support, that if a State is unable to punish persons for expressing their views on matters of great public importance when those matters are being considered in an investigation by the grand jury, a clear and present danger to the administration of justice will be created. We find no such danger in the record before us." 370 U.S. at 386-88 (emphasis in original)

The demands made by the Court in *Wood* may be made of the Commonwealth in the instant case. Nowhere did the Commonwealth demonstrate how the publication interfered with the administration of justice. As in *Wood*, no prosecution witnesses were called to show how the functioning of any court or investigative body was or would be disturbed. In fact, here the Commonwealth called no witnesses at all. There was no showing that the Commission's proceedings were or would be in any fashion interfered with and, if so, how Landmark's conduct was responsible for the interference. There was no showing that any of the interests referred to in sustaining the statute were, in fact, imperiled by the prohibition in question.

The holding of the Virginia Supreme Court as to the existence of a clear and present danger to the administration of justice caused by publication of Landmark's article is thus completely unsupported factually; it cannot obtain such support from the mere adoption of the statute at issue.

At the heart of the ruling of the Virginia Supreme Court is the conclusion that the Virginia legislature—as well as

many other legislatures—found a clear and present danger to the administration of justice in the publication of articles such as are at issue here. The Virginia Supreme Court held that the restrictions on reporting came to it in "'the armor wrought by prior legislative deliberation.'" *Bridges, supra,* 314 U.S. at 261. (JA 69) Legislative determination that a clear and present danger exists may not substitute for actual proof of imminent danger on the facts of the case, even where such determination has been made.

The concept of presumptive validity of legislative enactments, appropriate in other contexts, has no applicability to direct restrictions on the contents of speech. Indeed, this Court has, since *Bridges,* recognized that where such fundamental rights are at stake, the burden is on the state to support its action. *See Elrod* v. *Burns,* 427 U.S. 347, 362 (1976).

The dictum in *Bridges* as to the significance to be accorded legislative deliberation seems to stem from the determination in *Gitlow* v. *New York,* 268 U.S. 652 (1925) where this Court deferred to the legislature when that body found particular categories of words required the imposition of criminal sanctions. *Id.* at 670-71. Justices Holmes and Brandeis dissented from this approach, requiring, as had Mr. Justice Holmes in first articulating the test, that the clear and present danger test be applied to the facts of every case.

> "[A legislative declaration] does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. As a statute, even if not void on its face, may be challenged because invalid as applied, . . . the result of such an enquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free

> speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature." *Whitney* v. *California,* 274 U.S. at 378-79 (Brandeis, J., concurring)

The views of Justices Brandeis and Holmes were accepted as correct in *Dennis* v. *United States, supra,* 341 U.S. at 506-07 (opinion of Vinson, C.J.), 536-37, 541 (Frankfurter, J., concurring) and the clear and present danger test was applied to the facts of the particular case. 341 U.S. at 507-08. *See also* Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto,* 22 Stan.L.Rev. 1163, 1173 (1970).

In recent decisions this Court has freely judged the constitutionality of statutes restricting speech without deference to the fact of the statute's legislative enactment. *See, e.g., Cox Broadcasting Corp.* v. *Cohn, supra; Linmark Associates, Inc.* v. *Township of Willingboro, supra.* In the recent commercial speech cases, statutes were overturned as unconstitutional infringements of the First Amendment, notwithstanding legislative findings and explicit testimony offered in the trial court in support of the legislation. *See, e.g., Linmark Associates,* 45 U.S.L.W. at 4442; see also, the detailed stipulation of facts in *Virginia Pharmacy.* Particularly in the absence of any legislative history or findings as to the need for criminal sanctions, according deference to, let alone blind acceptance of, the legislature's judgment, is unacceptable. *See Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 107 (1952).

In any event, there is absolutely nothing in the legislative history of the adoption of Va. Code § 2.1-37.13 which

supports the conclusion that the legislature found a clear and present danger to exist with respect to publications of the sort included here. Nor does the Virginia Supreme Court cite to any portion of such history to support its contrary conclusion.

There is, to be sure, the finding that proceedings shall be "confidential" and that the identity of accused judges, if contained in "papers filed with and proceedings before the Commission," shall not be "divulged"; but there is not a word of legislative history to the effect that newspapers or others that learn of what has transpired in those proceedings may not disclose it. Thus, the conclusion of the decision that it is based upon "'the armor wrought by prior legislative deliberation'", *Bridges, supra,* 314 U.S. at 261 (JA 69), is simply unsupported; there is no basis for concluding that the "deliberation" adverted to in *Bridges* occurred at all—at least as regards the imposition of criminal penalties upon newspapers for publishing what they learn of the proceedings of the Commission.*

Nor does the ruling below find support in the passage by other jurisdictions of what the Virginia Supreme Court refers to as "similar" statutes. In one sense, of course, it is plainly accurate to state that the statutes of the other jurisdictions referred to by the Court are similar; in another, it is quite inaccurate. Of the other jurisdictions only *one*—Hawaii—makes it a crime to disclose any part of the proceedings held before the judicial inquiry com-

* Significantly, Professor Emerson concludes that the *Bridges* line of cases would have been decided identically, even if they had arisen under criminal statutes. T. Emerson, *The System of Freedom of Expression* 456 (1970).

mission.* Virtually all the other jurisdictions require confidentiality; none of the others criminally punishes anyone, let alone the press, for breach of that confidentiality.**

* Rule 16 of the Rules of Practice and Procedure of the Hawaii Commission for Judicial Qualification provides that:

"[a]ny commission member or individual, including the individual making the charge, who divulges information concerning the charge prior to the certification [thereof] . . . shall be guilty of a felony . . . ."

** The American Judicature Society study, *Judicial Disability and Removal Commissions, Courts and Procedures* (G. R. Winters & R. S. Lowe, eds. 1973), relied on by the Virginia Supreme Court, as updated by *Resource Materials for 5th National Conference of Judicial Disability Commissions* (E. J. Schoenbaum, ed. 1976), lists a total of 42 jurisdictions (40 states, the District of Columbia and Puerto Rico) as providing for some type of judicial disciplinary procedure.

As noted above, Hawaii is the *only* state other than Virginia to impose a criminal sanction for violation of any confidentiality requirement. Hawaii Rev. Stat. § 610-3(b)

Those constitutional, statutory or administrative provisions imposing a requirement of confidentiality are as follows: Alabama: Const. Art. 6 § 156(b), Rule 5 of the Rules of Procedure of the Judicial Inquiry Commission; Alaska: Stat. § 22.30.060, Rule 2 of the Rules of the Commission on Judicial Qualifications; Arizona: Const. Art. 6.1 § 5, Rule 10 of the Rules and Procedures of the Commission on Judicial Qualifications; California: Const. Art. 6 § 18(f), Rule 902 of Title III (Miscellaneous Rules) Div. I (Rules for Censure, Removal, Retirement or Private Admonishment of Judges); Colorado: Const. Art. 6 § 23(3)(d), Rule 3 of the Rules of Procedure of the Commission on Judicial Qualifications; Connecticut: Gen. Stat. § 51-51(c-d); Delaware: Const. Art. 4 § 37, Rule 10(d) of the Rules of Procedure of the Court on the Judiciary; District of Columbia: Code § 11-1528, Rule 21 of the Rules of the Commission on Judicial Disabilities and Tenure; Florida: Const. Art. 5 § 12(d), Rule 25 of the Rules of the Judicial Qualifications Commission; Georgia: Const. Art. 6 § 13 ¶ 3; Hawaii: Rev. Stat. §§ 610-3(a), 610-12(b), Rule 15 of the Rules of Practice and Procedure of the Commission on Judicial Qualification; Idaho: Code § 1-2103, Rule 24 of the Rules of the Judicial Council; Illinois: Const. Art. VI § 15(e), Rule 5 of the Rules of Procedure of the Judicial Inquiry Board; Indiana: Const. Art. 7

Thus, the conclusion of the Supreme Court of Virginia as to the "indispensable" nature of criminal sanctions to enforce confidentiality is all but totally unsupported outside Virginia—as well as lacking support in the legislative history within Virginia.

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§ 11, Code Ann. § 33-2.1-5-3, Rule 5 of the Rules of the Judicial Qualifications Commission; Iowa: Code Ann. § 605.28; Kansas: Stat. § 20-175 (Rule No. 607 of the Rules of the Supreme Court Relating to Judicial Conduct); Louisiana: Const. Art. 5 § 25(C), Rule 23 § 23 of the Supreme Court Rules, Rule 10 of the Rules of the Judiciary Commission; Maryland: Const. Art. IV § 4B(a), Rules 1227 (e,r) of the Rules of Procedure; Michigan: Const. Art. VI § 30(2), Rule 932.22 of the Supreme Court Administrative Rules; Minnesota: Stat. Ann. § 490.16(5), Rule S of the Rules of the Commission on Judicial Standards; Missouri: Rule 12.23 of the Rules of the Commission on Retirement, Removal and Discipline; Montana: Rev. Codes Ann. § 93-723; Nebraska: Const. Art. V § 30(3), Rev. Stat. § 24.726, Rule 2 of the Rules of the Commission on Judicial Qualifications; New Jersey: Rule 2:15-11(e) of the Rules Governing Appellate Practice in the Supreme Court and the Appellate Division of the Superior Court; New Mexico: Const. Art. VI § 32, Rule 7 of the Procedural Rules and Regulations of the Judicial Standards Commission; New York: Jud. Law § 44 (McKinney Supp.); North Carolina: Gen. Stat. § 7A-377(a), Rule 4 of the Rules of the Judicial Standards Commission; North Dakota: Cent. Code § 27-23-03(5), Rule 4 of the Rules of Procedure of the Judicial Qualifications Commission; Ohio: Rule 21 of the Supreme Court Rules of Practice; Oklahoma: Stat. Ann. tit. 20 § 1658 (West), Rule 5 (C) of the Rules of the Council on Judicial Complaints; Oregon: Rev. Stat. §§ 1.420(2), 1.440, Rule 7 of the Rules of Procedure of the Commission on Judicial Fitness; Pennsylvania: Const. Art. 5 § 18(h), Rule 20 of the Rules of Procedure of the Judicial Inquiry and Review Board, South Carolina: Rule 34, Items 11 and 33, of the Rules of the Supreme Court; South Dakota: Const. Art. V § 9, Compiled Laws Ann. § 16-1A-4, Rule 4 of the Rules of the Judicial Qualifications Commission; Tennessee: Code Ann. §§ 17-811(2), 17-813(2); Texas: Const. Art. 5 § 1-a(10), Rule 19 of the Rules for Removal or Retirement of Judges; Utah: Code Ann. § 49-7a-38(5); Vermont: Rule 3 of the Rules of the Supreme Court for Disciplinary Control; Virginia: Const. Art. VI § 10, Code § 2.1-37.13, Rule 10 of the Rules of the Commission on Judicial Inquiry and Review, Wisconsin: Item 21 of the Code of Judicial Ethics, Rules 2 and 3(4) of the Rules of Procedure of the Judicial Commission; Wyoming: Rule 7 of the Rules of the Judicial Supervisory Commission.

Puerto Rico does not appear to require confidentiality: Const. Art. V § 11, Laws Ann. tit. 4 § 232 and App. XV thereto (Rules for the Informal Hearing Proceeding or for the Separation from Service of Judges).

III.

Va. Code § 2.1-37.13 Is Unconstitutionally Vague and Overbroad

A. *The Unconstitutional Vagueness of Va. Code § 2.1-37.13*

This Court has frequently indicated the special concern with which it views—and reads—statutes limiting freedom of expression. As the Court observed in *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966):

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer."

See also Erznoznik v. *City of Jacksonville*, 422 U.S. 205, 217-18 (1975) ["Where First Amendment freedoms are at stake . . . precision of drafting and clarity of purpose are essential."]; *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964). The constitutional test of definiteness is particularly strict in the case of a criminal statute such as Va. Code § 2.1-37.13. *E.g.*, *Winters* v. *New York*, 333 U.S. 507, 515-16 (1948). And this Court has recently repeated that it takes "special care to insist on fair warning when a statute regulates expression and implicates First Amendment values." *Marks* v. *United States*, 45 U.S.L.W. 4233, 4235 (U.S. March 1, 1977).

The danger of vagueness in areas affected with a First Amendment interest is particularly disturbing because "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms' it 'operates to inhibit the exercise of [those] freedoms.'" *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972).

The application of Va. Code § 2.1-37.13 to the publication of *The Virginian-Pilot* on October 4, 1975 runs afoul of all these cautionary strictures. The statutory language provides that "[a]ll papers filed with and proceedings before the Commission . . . including the identification of the subject judge as well as all testimony and other evidence . . . shall be confidential and shall not be divulged by any person to anyone except the Commission . . . ."

Here the statute is ambiguous as to both the circumstances which constitute "divulgence" and the source and type of information which may not be divulged. It may fairly be said of this statute that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). Under such circumstances, it fails to give "fair warning" and it cannot stand. *Grayned*, 408 U.S. at 108.

The initial vagueness problem is created by the failure of the statute to set forth with clarity the scope of its coverage. The Commonwealth has suggested, in its motion to affirm (pp. 13-14) that because the statute prohibits "divulgence by any person to anyone except the Commission," it obviously must include Landmark. But any such reasoning is unavailing.

Despite the absolutely prohibitory nature of the statute, divulgence to *some* persons other than the Commission —*i.e.*, to the judge under investigation and his counsel—is necessarily intended.* *See, e.g.*, Va. Code § 2.1-37.12. Thus, a literal interpretation of the statute, prohibiting divulgence *by any* person *to anyone*, is inconsistent with the statutory scheme itself.

* The Commission is also authorized to "divulge" information to the legislature at the latter's request. Va. Code § 2.1-37.17:1(b).

A distinct problem has resulted from the ambiguity of the term "divulge" itself and the failure of the statute to make clear an intent to include newspaper reports and other statements by non-participants within its coverage. The use of the term "divulge," susceptible of a number of distinct meanings,* together with the failure to indicate explicitly that newspapers and other non-participants in Commission proceedings were to be covered, created a serious problem of "fair warning" with respect to the statute.** Certainly if the legislature undertook so momental a step as a total prohibition on coverage by the press

* The statute nowhere defines the term "divulge"—and as the record indicates the term is capable of several distinctly different meanings.

At trial, counsel for Landmark urged—based upon the definition contained in *Webster's Third International Dictionary* (1961) —that "divulge" concerned the first act of disclosure only and that information became public upon, and only upon, its first disclosure. (JA 11) The Commonwealth responded—based upon the definition in *Webster's Second College Edition*—that "divulge" meant "to make public." (JA 32) The decision of the Supreme Court of Virginia here at issue—relying upon yet a third dictionary [*Black's Law Dictionary* (4th ed. 1951)]—held that "divulge" meant "to disclose [information] or make it known." "Clearly", the Virginia Supreme Court ruled, Landmark violated the statute. (JA 59) But, as the conflict of the dictionaries suggests, the legal meaning of "divulge," let alone a discernible legislative intent to apply the statute to newspapers, is far less clear.

For one thing, as we have previously discussed, there is *no* legislative history on point, save only a general intent that proceedings be "confidential." Indeed, when the Virginia legislature has previously intended to adopt a statute *prohibiting* newspapers from publishing material, it has done so explicitly. Va. Code § 53-322 thus provides that "[n]o newspaper or person shall print or publish the details of the execution of criminals. Only the fact that the criminal was executed shall be printed or published." (We do not, of course, concede the constitutionality of that statute which we believe to be facially violative of the First and Fourteenth Amendments.)

** Of course, the decision of the Virginia Supreme Court determining that the statute applies to newspapers would not cure the original ambiguity and unfairness for purposes of this conviction, even in the absence of other vagueness problems. *See Ashton* v.

of an entire area of news, one might expect some explicit statement of legislative intent.

Precise legislative drafting is required, *inter alia*, to assure that the legislature has "focused on the First Amendment interests and determined that other governmental policies compel regulation." *Grayned*, 408 U.S. at 109 n.5. This consideration is a particularly telling one here where the imprecision of the statute simply reinforces the impression, left by the absence of any discussion as to the need for criminal sanctions on newspapers, that the First Amendment impact on the press of Va. Code § 2.1-37.13 was never considered by the Virginia legislature.

Other vagueness problems relate to the type of information covered. On its face, the statute is unclear as to material covered. It is susceptible of both a limiting interpretation barring only disclosure of certain specified materials filed with, or proceedings before, the Commission, as well as a broad and open-ended interpretation. It provides that:

> "*All papers filed with and proceedings before the Commission*, and under the two preceding sections (§§ 2.1-37.11, 2.1-37.12), *including* the identification of the subject judge *as well as all testimony and other evidence and any transcript thereof* made by a reporter, *shall be confidential* and shall not be divulged by any person to anyone except the Commission . . . ." (emphasis added)

The Virginia Supreme Court apparently sought to clarify this point,* holding that the statute

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Kentucky, 384 U.S. 195, 198 (1966). Any other result would deprive a defendant of the "fair warning" required of all criminal statutes.

* The statute does, of course, refer to identification of the subject judge as being an item which may not be divulged. The statute itself is completely unclear, however, as to whether such identification is prohibited only when (1) obtained from a paper filed with the Commission or an account of the proceeding or (2) from any source whatever. Does the statute bar publication of the fact that the judge himself announced, in open court, that a complaint had been filed against him? *Cf. Craig*, 331 U.S. at 374; *Cox Broadcasting Corp.* v. *Cohn*, *supra*.

> "[i]n unmistakable terms . . . states that *all information concerning a proceeding before the Commission*, including the identity of the judge who is the subject of the inquiry shall be confidential . . . ." (JA 59) (emphasis added)

This interpretation allowed affirmance of the conviction despite the total absence of any evidence that the information disclosed consisted of "papers filed with and proceedings before the Commission." * But the cost of such interpretation was the exacerbation of the existing vagueness problem, a vagueness problem of immense proportions.

What is the limit to "information *concerning* a proceeding"? Does this language, for example, bar newspapers from reprinting information previously published by other newspapers or news services? Does the statute prohibit a newspaper from reporting on an open session of a house of the state legislature in which the reappointment of a

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* The Texas State Judicial Commission has apparently interpreted its own laws in a radically different manner. Texas is one of the states cited by the Supreme Court of Virginia as applying a confidentiality rule similar to its own. The Texas provision provides:

> "All papers filed with and proceedings before the Commission or a Master shall be confidential . . . provided that upon being filed in the Supreme Court the record loses its confidential character." Texas Const. Art. 5, § 1-a(10)

Despite this requirement, the Texas Commission itself felt free to publicize the fact that it intended to investigate a sitting judge. *See* discussion, *supra*, at pp. 23-24. This illustrates clearly at least one alternative reading of "all papers and proceedings." It suggests again the fatal ambiguity of the Virginia statutes.

judge investigated by the Commission was discussed? Does it bar discussion of court events which are also the subject of a complaint before the Commission?

The statute, as authoritatively construed by the Virginia Supreme Court, thus presents the classic problem of wording so vague as to deny fair warning and to present the potential for "arbitrary and erratic arrests and convictions." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972). Such a statute cannot survive the strict scrutiny required where speech is so directly infringed.

B. *The Unconstitutional Overbreadth of Va. Code* § 2.1-37.13

As is often the case, unconstitutional overbreadth is a close relative of unconstitutional vagueness. Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

"It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. *Herndon* v. *Lowry*, 301 U.S. 242, 258 (1937); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960); *Grayned* v. *City of Rockford*, 408 U.S. at 116-117. As a corollary, the Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' *Dombrowski* v. *Pfister*, 380 U.S., at 486. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression

are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-12 (1973).

This approach has been applied most rigorously in cases which, like the present one, involve regulation of "only spoken words" rather than conduct. *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972); *Cohen* v. *California*, 403 U.S. 15 (1971); *Street* v. *New York*, 394 U.S. 576 (1969).

"In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick*, 413 U.S. at 612.

The principal precondition to the application of such approach is the requirement that the state court be given an opportunity to narrow the statute. *Broadrick*, 413 U.S. at 612-15. Here the Virginia Supreme Court has been given an opportunity to narrow the sweep of the statute and has, if anything, expanded it in terms of coverage.* It has justified the statute in the broadest terms, expressly refused to consider the limitation of such justifications to specific factual circumstances, and has characterized the statute as placing "the least possible restraint upon the public interest while, at the same time, . . . assur[ing] effective functioning of the Commission." (JA 73) Under these circumstances, there can be no doubt that the state Supreme

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* It has, for example, expanded the statutory ban on divulgence of "all paper filed with and proceedings before the Commission" to cover "all information concerning" proceedings.

Court has declined to narrow the statute and cannot be expected to narrow it in the future. Its decision is thus ripe for review under the overbreadth doctrine. *See Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 216-17 (1975).

The deterrent to the exercise of legitimate First Amendment rights posed by this statute is "real and substantial." *Erznoznik,* 422 U.S. at 216. Here what is involved is a statute which is neither "narrowly drawn" nor one which, at least as it is now said to relate to the press, represents "a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick,* 413 U.S. at 611-12. In an attempt to clarify the statute, the Virginia Supreme Court has so extended the statutory sweep as to include actions which, under any interpretation of the Constitution, are protected.

As interpreted by the Virginia Supreme Court, the statute at issue makes it a crime *ever* to identify a judge who is or has been investigated by the Commission, unless charges are publicly filed against him. Thus, if a private citizen, an attorney or a newspaper believes some impropriety has prevented an incompetent judge from having formal charges filed against him, they could never disclose this view, except at the risk of imposition of criminal sanctions.* Similarly, if a complainant concluded that the

Commission had improperly rejected a complaint filed by him, he could never express his views. If a witness against a judge felt retribution had been taken against him for the giving of testimony, his disclosure of this fact to anyone other than the Commission itself or even the bringing of a lawsuit to redress this grievance would be subject to criminal sanctions, as would be the reporting of such events. Such conduct, swept within the grasp of the statute, is, of course, protected by the First Amendment. *See Cox Broadcasting Corp.* v. *Cohn, supra; Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *Craig* v. *Harney, supra.* Without more, the statute must fall, because even if it is assumed that all other applications would be valid, these are prohibited and would deter legitimate speech. *See Keyishian* v. *Board of Regents,* 385 U.S. 589, 609 (1967); *see also United States* v. *Robel,* 389 U.S. 258, 265-66 (1967).

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* This sort of broad coverage is simply unnecessary to protect any of the interests identified by the Virginia Supreme Court as justifying the statute. It is the established rule that statutes infringing speech in the interests of preserving other interests must use the least restrictive means available to accomplish the legislative goal. *Buckley,* 424 U.S. at 25 (1976); *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. at 563-65 (1976); *Dunn* v. *Blumstein,* 405 U.S. at 343 (1972); *Shelton* v. *Tucker,* 364 U.S. at 488 (1960). The failure to employ the least restrictive means available to accomplish the legislative goal, *viz.* a restriction limited to those who participated in or were in attendance at the Commission proceedings, or to a penalty for particular disclosures having a clearly prejudicial effect on Commission proceedings, provides a distinct basis for invalidity here.

The Virginia Supreme Court has stated that the statute indeed involves the narrowest restrictions on speech possible consistent with the legislative goals. In respect of this conclusion, it asserts that "the statute does not curtail general comments or criticism concerning a judge or the conduct of his judicial affairs." (JA 73-74)

But the statute deprives the citizen of the factual basis upon which to ground such comments and "[t]he protection of the public requires not merely discussion, but information." *Sullivan,* 376 U.S. at 272, quoting *Sweeney* v. *Patterson,* 128 F.2d 457, 458 (D.C. Cir.), *cert. denied,* 317 U.S. 678 (1942). The restriction, far from being narrow, reaches the most basic elements of free expression.

CONCLUSION

It may be useful, in conclusion, to emphasize what this case is not about. It is not a case in which a newspaper seeks judicially decreed access to sealed or secret documents. It is not a case in which a newspaper challenges a statute relating to publication of allegedly "private" facts. And it is not a case involving restrictions placed on conduct or the time, place or manner of otherwise protected expression.

This is a case in which a state has subjected a newspaper to criminal punishment for truthful reporting about a proceeding concerning the fitness of a public official. Such a statute, we believe, cannot be constitutionally upheld.

In urging that Virginia may not make criminal the reporting at issue here, we do not denigrate the need for assuring the highest quality of the judiciary. Nor do we doubt the wisdom of Chief Judge Traynor's telling observation that "in the judiciary, as in every other walk of life, a bad man is as hard to lose as a good man is hard to find."* It is possible that "bad men" may be easier lost to the judiciary if there are no leaks from the Commission; but it is at least as likely that the publication of such information will expose unfit judges and unfit commissions. The hypothesis of the First Amendment is that if a choice must be made in such circumstances, it is to be made in favor of freedom.

---

* Traynor, *Who Can Best Judge The Judge?*, 42 Cal.State Bar J. 225, 238 (1967).

The judgment of the Supreme Court of Virginia should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

On Appeal From The Supreme Court Of Virginia

BRIEF OF APPELLEE

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IN THE

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OCTOBER TERM, 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

On Appeal From The Supreme Court Of Virginia

BRIEF OF APPELLEE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

Article VI, § 10 of the Constitution of Virginia provides, in part:

> "The General Assembly shall create a Judicial Inquiry and Review Commission consisting of members of the judiciary, the bar, and the public and vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge. The Commission shall be authorized to conduct hearings and to subpoena witnesses and documents. Proceedings before the Commission shall be confidential.
>
> "If the Commission finds the charges to be well-founded, it may file a formal complaint before the Supreme Court.
>
> "Upon the filing of a complaint, the Supreme Court shall conduct a hearing in open court and, upon a finding of disability which is or is likely to be permanent and which seriously interferes with the performance by the judge of his duties, shall retire the judge from office. A judge retired under this authority shall be considered for the purpose of retirement benefits to have retired voluntarily.
>
> "If the Supreme Court after the hearing on the complaint finds that the judge has engaged in misconduct while in office, or that he has persistently failed to perform the duties of his office, or that he has engaged in conduct prejudicial to the proper administration of justice, it shall censure him or shall remove him from office."

Sections 2.1-37.1 through 2.1-37.18 of the Code of Virginia provide for the establishment, nature of and rules relating to the Virginia Judicial Inquiry and Review Commission. Section 2.1-37.13 provides, in relevant part, as follows:

> "All papers filed with and proceedings before the Commission, and under the two preceding sections (§ § 2.1-37.11 ['Order compelling witnesses to attend and testify'], 2.1-37.12 ['Depositions']), including the

> identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character. . . .
>
> "All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with the tribunal, shall be kept in the confidential files of the Commission.
>
> "Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."

QUESTIONS PRESENTED

1. May the Commonwealth of Virginia subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before the State Judicial Inquiry and Review Commission, where such proceedings are expressly declared to be confidential by the State Constitution and Statutes?

2. Is the Commonwealth of Virginia required to produce actual facts of a clear and present danger to the administration of justice to support a conviction under Virginia Code Section 2.1-37.13, where such determination has been made in the State Constitution and Statute?

3. Is Virginia Code Section 2.1-37.13 unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

This case arose out of an article published on October 4, 1975, by The Virginian-Pilot, a newspaper published by

Landmark. On the first page of the second section, an article appeared concerning an investigation conducted by the Virginia Judicial Inquiry and Review Commission [hereafter "Commission"]. The article discussed a Commission investigation into the general competence of a named judge of a local court. The article noted that Commission proceedings are conducted in strict secrecy since it is a misdemeanor to reveal Commission actions. (JA 47).

A grand jury of the Circuit Court of the City of Norfolk indicted Landmark on November 5, 1975, for the publication of the article of October 4, 1975, in violation of § 2.1-37.13 of the Code of Virginia (1950), as amended.

The trial commenced on December 10, 1975, after the trial court had denied Landmark's Motion to Dismiss and Quash the Indictment. The case was tried basically upon a stipulation of facts. The stipulation provided that Landmark published The Virginian-Pilot; that the article of October 4, 1975, carried a story naming a judge subject to a Commission investigation; and that at the time of the publication, the Commission had not filed any formal complaint with the Supreme Court of Virginia (JA 6).

Joseph W. Dunn, Jr., the managing editor of The Virginian-Pilot testified that he had decided to publish the article upon his belief it was an important story. He further testified that while he understood it was a misdemeanor to divulge such information, he considered the statute to apply only to those who participated in the proceedings. Mr. Dunn further testified that no reporter, employee or agent of Landmark had participated in the Commission proceedings. (JA 42-43).

The trial court found Landmark guilty on January 15, 1976, and imposed a fine of $500 and the payment of costs. (JA 50).

Upon appeal to the Supreme Court of Virginia, the conviction was affirmed with one justice dissenting. The Virginia Supreme Court recognized that the case represented a direct confrontation between the First Amendment and the Virginia statute which was both serious and important. (JA 59-60).

The Virginia Supreme Court viewed the present case as one involving "subsequent punishment" rather than a prior restraint. (JA 62). This treatment of the case is not contested by Landmark. Appellant's brief 7. The Court found that the statute sprang from a "clear and well-defined legislative declaration" that publication of Commission proceedings before being filed with the Supreme Court was "so contrary to the public interest" that criminal sanctions were warranted. (JA 69). The Court found that the confidentiality of Commission proceedings served three interests:

> "(1) Protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious." (JA 72-73).

A Notice of Appeal was filed by Landmark on April 15, 1977, and this Court noted probable jurisdiction on June 13, 1977.

SUMMARY OF ARGUMENT

This case focuses upon a confrontation between the First Amendment guarantee of freedom of the press and a Virginia statute which imposes criminal sanctions for breach

of the confidentiality of proceedings before the Virginia Judicial Inquiry and Review Commission.

This Court has recognized that freedom of the press is not an absolute right, and the state may punish its abuse. *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931). The statutory scheme in question represents a legislative declaration that certain matters are to be confidential, and provides punishment for those who breach that confidentiality.

The statute in question does not prohibit nor curtail general comment or criticism concerning a judge or the conduct of his judicial affairs. Nor does the statute completely suppress the reporting of disciplinary proceedings against state judges. The statute applies only to information which the state has chosen not to place in the public domain.

A state has the right to make the judgment that certain matters are not to be made public. A collary right exists to punish those who make known that which the state has chosen to keep confidential.

The relationship of the statute in question to the administration of justice is discussed in Part II of this brief. The purposes to be served by the confidentiality of Commission proceedings spring both from history and experience.

History establishes that the methods of dealing with disabled or unfit judges by legislative impeachment, or removal were seldom used and generally unsatisfactory. Consequently, the public interest demanded new and bold steps to deal with a subject so vital to the functioning of the system of justice.

In reponse to this unsatisfactory situation, 42 jurisdictions now provide for some type of judicial disciplinary procedure. In all jurisdictions, with the possible exception of Puerto Rico, a requirement of confidentiality is provided for by Constitution, statute or rule. A clear and present

danger to the administration of justice by premature disclosure of these sensitive proceedings is well established by the collective judgment of the people.

The final portion of this brief responds to the challenge that the Virginia statute is vague and overbroad.

The statute being penal in nature must be strictly construed. But, when this test is applied, the statute does not suffer the doubt or ambiguity asserted by Landmark. The statute is drawn in clear and concise language which enables one to reasonably understand that which is proscribed.

The statute states in unmistakable terms that information concerning a proceeding before the Commission, including the identity of the judge under investigation, shall be confidential and shall remain so until a formal complaint against the judge is filed in the Supreme Court of Virginia.

The statute does not suffer from overbreadth. The circumstances suggested in which the statute might apply do not deal with concrete situations, and actual practice shows them to be unfounded and unwarranted.

ARGUMENT

I.

The Commonwealth May Impose Criminal Sanctions For Divulging Information Regarding Proceedings Before The State Judicial Inquiry And Review Commission Where Such Proceedings Have Been Expressly Declared To Be Confidential By State Constitution and Statute.

The question of whether a state can impose criminal sanctions for publishing confidential materials of a Commission which investigates allegations of judicial misconduct is a case of first impression for this Court. The only other case which has called into question the constitutionality of the

requirement of confidentiality of such a proceeding arose in Hawaii. In an unpublished opinion,[3] the lower court upheld the constitutionality of the statute, and the case is on appeal in the Supreme Court of Hawaii. It would appear that this Court reserved judgment on just such an issue in *Cox Broadcasting Corp* v. *Cohn*, 420 U.S. 469 (1975).[3]

Landmark has characterized the issue before this Court as one in which the State has made it a crime to publish truthful information about public officials with respect to the performance of their duties. As to this characterization Landmark casts its net too broadly. The statute neither deals with public officials as a class nor does it seek to stifle debate about the functioning and conduct of public officials. The statute is limited in scope and proposes to deal only with proceedings before the Judicial Inquiry and Review Commission when it is investigating allegations of judicial misconduct. As found by the Supreme Court of Virginia "the statute does not curtail general comment or criticism concerning a judge or the conduct of his judicial affairs." 217 Va. at 712. Furthermore, the statute specifically provides that records of any Commission proceeding filed with the Supreme Court lose their confidential character, thereby giving the public and the press full and unrestrained freedom to discuss those matters which have reached the dignity of verified charges.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press." Despite this language, freedom of the press does not mean the unlimited right to publish anything at all. This Court has refused to give protection to certain categories of speech—such as fighting words, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), or obscenity, *Roth* v. *United States*, 354 U.S. 476 (1957), or libel, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), or incitement, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

[3] *Partington* v. *State of Hawaii, et al.*, Civil No. 49320 (Hawaii 1st Cir. Apr. 21, 1977).

[3] 420 U.S. 469, 497 n. 27 (1975).

Mr. Chief Justice Hughes, writing for this Court in *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931), clearly enunciated the principle that a State may punish abuses by the press when he said, "liberty of speech, and of the press, is . . . not an absolute right, and the state may punish its abuse." Freedom of the press cannot be turned into so irrational a concept as to bring about a paralysis of the means for effective protection of other interests.[3]

Public expression may be subject to reasonable regulation when it serves a legitimate public interest. *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).[4] The public interest found by the Supreme Court of Virginia upon which the questioned statute rests is the orderly administration of justice. (JA 70, 74).

As this case deals with the orderly administration of justice, it cannot be viewed as dealing with public officials

[3] "Because freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process. But even that freedom is not an absolute and is not predetermined. By a doctrinaire overstatement of its scope and by giving it an illusory absolute appearance, there is danger of thwarting the free choice and the responsibility of exercising it which are basic to a democratic society." *Bridges* v. *California*, 314 U.S. 252, 293 (1941) (Frankfurter, J., dissenting).

[4] *See also Adderly* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *Louisiana*, 379 U.S. 536 (1965). "In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." *Patterson* v. *Colorado*, 205 U.S., 454, 462 (1907).

in the abstract. Judges, while public officials, sit at the pinnacle of the system of justice, and exercise power which permeates every facet of public life. This power reaches to liberty itself.

As Justice Frankfurter once observed:

> "The independence of the judiciary is no less a means to the end of a free society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective. For the judiciary cannot function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court. The judiciary is not independent unless courts of justice are enabled to administer law by absence of pressure from without, whether exerted through the blandishments of reward or the menace of disfavor." *Pennekamp* v. *Florida*, 328 U.S. 331, 355 (1946) (Frankfurter, J., concurring).

Without question, citizens and the press have the right to criticize the conduct of judges, but the State also has the right and the duty to prevent public disclosure of governmental affairs in those areas in which disclosure may reasonably be thought to be inconsistent with the public interest.[5]

The need for secrecy in governmental affairs is expressly recognized in the Constitution: in providing for publication of a journal of each House of Congress, it excepted "such parts as may in their judgment require secrecy."[6]

This Court has repeatedly recognized the need for some secrecy in governmental affairs. *Zemel* v. *Rusk*, 381 U.S. 1

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[5] *Cf. United States* v. *Marchetti*, 466 F.2d 1309 (4th Cir.) *cert. denied* 93 S.Ct. 553 (1972) (relating to area of national security).

[6] U. S. Const., Art. I, § 5.

(1965); *United States* v. *Reynolds*, 345 U.S. 1 (1953). The secrecy which attends the conferences of the Justices of this Court is just another example of a determination that the administration of justice can best be served in an atmosphere free from the public glare.

It must be recognized that this case does not represent a situation where the State has conducted its affairs in a public atmosphere, and then sought to regulate what is published concerning such matters. The Commonwealth is fully cognizant of the rulings of this Court which hold that where the State places information in the public domain, it cannot restrain its publication. *Cox Broadcasting Corp* v. *Cohn, supra; Nebraska Press Ass'n.* v. *Stuart*, 427 U.S. 539 (1976).[7]

This is not a case of a prior restraint, but clearly presents the issue of the right of a State, through its citizens and elected representatives, to declare certain matters of public interest to be confidential, and to punish those who breach that confidentiality. This difference in procedure is critical since the distinction between "prior restraint" and "subsequent punishment" is based upon "a theory deeply etched in our law", *viz.* that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975). Accordingly, the "presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Id.* at 558-59.

The statutory scheme followed by the Commonwealth in this case is consistent with the procedures outlined by this

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[7] *See also Sheppard* v. *Maxwell*, 384 U.S. 333 (1968); *Craig* v. *Harney*, 331 U.S. 367 (1947).

Court in *Cox Broadcasting Corp., supra.* In this regard, this Court stated:

> "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interest in privacy with the interests of the public to know and of the press to publish." 420 U.S. at 496.

The Commonwealth has complied with the dictates of *Cox,* by the passage of § 2.1-37.13. First, the Commonwealth has taken Commission matters out of the public domain by providing that proceedings of the Commission are to be confidential. The papers filed with the Commission are not made a part of any public record, and the proceedings are conducted in private. Second, the interests in privacy have been weighed with the interests of the public to know and of the press to publish. The Supreme Court of Virginia has found that § 2.1-37.13 represents a legislative declaration by the Virginia General Assembly, fortified by a plain statement of public intent expressed in the Virginia Constitution, that a clear and present danger to the orderly administration of justice would be created by divulgence of the confidential proceedings of the Commission. (JA 67).

The interests of the State in preserving respect for the judicial system on the one hand have been balanced with the interests of a free press on the other. In speaking of balancing competing interests, Mr. Justice Brandeis in *Whitney* v. *California,* 274 U.S. 357, 373 (1926), said:

> "[A]lthough the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic, or moral."

Section 2.1-37.13 has its genesis in Article VI, Section 10, of the Constitution of Virginia (1971). This constitutional provision itself provides that proceedings before the Commission shall be confidential. The necessity for confidentiality of Commission proceedings is self-evident from this statement:

> "Proceedings before the Commission must be confidential. The initial job of the Commission will be to ascertain which complaints have sufficient merit to deserve serious attention. Obviously there is the risk that a disappointed litigant may seek to vent his wrath upon the judge by filing a complaint with the Review Commission, or that complaints will be filed upon other vexatious or frivolous grounds. Such complaints must be weeded out—hence the requirement of confidentiality of Commission proceedings." A. Howard, *Commentaries On The Constitution Of Virginia,* 764 (1974).

As noted by the Supreme Court of Virginia, the California experience furnishes significant support for the confidentiality of Commission proceedings:

> "A prime feature of the Commission plan for judicial discipline is that, unlike the impeachment, recall, and election processes, the charges, and investigation thereof, are not made public until and unless a recommendation for censure, removal or retirement is made to the Supreme Court. The proceedings are entirely confidential up to that point. This gives the individual judge and thereby the judiciary reputation protection until a full scale investigation has been made and a competent body of peers has made an adverse decision on the merits of the charge. The shield of confidentiality also preserves reputations while the corrective influence of the Commission is being exerted on a judge

> who would otherwise be reluctant to change his behavior lest the public view this as an admission of prior misconduct. . . . Thus, reputations are preserved while allowing ample opportunity for complete investigation and voluntary corrective action." Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal With Judicial Misconduct*, 3 U.S.F.L. Rev. 244, 255-56 (1968-1969).

The American Bar Association has recommended that proceedings to review possible judicial misfeasance, nonfeasance and disability should be confidential until the Commission recommends discipline by the highest court, at which time the Commission's record, upon being filed with the Court, should become public. A.B.A. Standards for Criminal Justice, *The Function of the Trial Judge*, § 9.1 (Approved Draft 1972).[8]

The criminal sanction provided by § 2.1-37.13 is nothing more than the remedy suggested in the views expressed by a number of Justices of this Court in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (White and Stewart, J.J., concurring) (Marshall, J. concurring) (Blackmun, J., dissenting). This is apparent in the language of Mr. Justice White:

> "What is more, terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but

[8] *Accord*, Reath, *Judicial Evaluation—The Counterpart to Merit Selection*, 60 A.B.A.J. 1246, 1248 (1974); Hazard, *Commission Introduces New Standards of Judicial Administration*, 60 A.B.A.J. 912, 914 (1974).

> failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way." 403 U.S. at 733.

In *Oklahoma Publishing Co.* v. *District Court*, ... U.S. ....., 97 S.Ct. 430 (1977), this court had before it a case in which the press published the name and photograph of a juvenile charged with murder. Oklahoma by statute provides for the secrecy of juvenile proceedings and records unless ordered to be opened to the public. These statutes were not challenged since the information published by the press had been obtained in open court. In deciding that prior cases clearly prohibited restraints on publication of information obtained in proceedings open to the public, this Court noted that there was no evidence that the newspapers acquired the information unlawfully or even without the State's implicit approval.

In this case, the Commonwealth has neither made available the information published by Landmark nor has the Commonwealth given her implicit approval that the information be made public. Quite to the contrary, the Commonwealth had done all in her power to see that such information was not placed in the public domain. Additionally, the manner in which Landmark obtained the information may be criminal.

The record is silent concerning the manner in which Landmark secured its initial information concerning the investigation by the Commission. (JA 58, n.4). What is clear, however, is that Landmark thereafter attempted to solicit additional confidential information from the members of the Commission, the judge under investigation and the

persons who appeared as witnesses. (JA 47). This solicitation was with the full knowledge that by divulging information about Commission proceedings, such individuals would thereby be committing a misdemeanor. (JA 43, 47). By approaching participants in the Commission proceedings, and by cajoling them to commit a misdemeanor, Landmark itself would be guilty of the common-law offense of solicitation. *Wiseman* v. *Commonwealth,* 143 Va. 631, 130 S.E.2d 249 (1925).[9]

Is this not the same type of conduct which is condemned as violating fundamental fairness and shocking to the universal sense of justice when carried out in the context of Government solicitation of crime.[10] Is it acceptable conduct in our society for the Press to corrupt otherwise innocent citizens into breaching their oaths of secrecy and thereby committing a crime? The Commonwealth unhesitantly answers the former in the affirmative and the latter in the negative. It cannot be convincingly argued that the framers of the Constitution ever intended that the First Amendment freedom of the press was to be used as a shield to commit criminal offenses.

This very contention was soundly rejected by this Court in *Frohwerk* v. *United States,* 249 U.S. 204 (1919). In speaking for this Court, Mr. Justice Holmes observed:

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[9] *See also,* Annot., *Solicitation to Crime as a Substantive Common-law Offense,* 35 A.L.R. 961, 965 (1925); 21 Am. Jur. 2d *Criminal Law* § 114 (1965). The common-law remains in full force in Virginia unless altered by the General Assembly. Section 110, Code of Virginia (1950), as amended.

[10] Entrapment has been recognized as a defense to a criminal prosecution when the government instigates a criminal act by persons otherwise innocent. *Sorrells* v. *United States,* 287 U.S. 435 (1932); *United States* v. *Russell,* 411 U.S. 423 (1973).

> "[T]he 1st Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not intended to give immunity for every possible use of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder . . . would be an unconstitutional interference with free speech." 249 U.S. at 206.

Without question the First Amendment seeks to protect the freedom of the press to report and to criticize judicial conduct. In publishing the article upon which this case is based, Landmark is asserting something more—the right to publish information concerning inquiries into judicial misconduct which by Constitutional mandate is to be confidential. The traditional notion of freedom of the press is not in issue here. Landmark is not free to publish this confidential information with impunity anymore than it could publish private documents in violation of a copyright, or disclose protected trade secrets, or invade individual privacy.[11]

It is for the State to provide for the security of those institutions which provide its citizens a strong system of justice. And, unless the State safeguards its own capacity to function, then society itself could become so disorganized that all rights and liberties would be endangered. *United States* v. *United States District Court,* 407 U.S. 297 (1972).

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining

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[11] "In principle as in practice, then, the 'right of the people to know' what Government does has always been reduced by 'the right—or duty,—or reponsibility—of the Government to withhold' in the public interest." *See,* Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers,* 120 Colum. L. Rev. 271, 275 (1971).

public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox* v. *New Hampshire,* 312 U.S. 569, 574 (1941).

It benefits no one to say that the State can determine that certain matters of public interest should be kept confidential, but that the press is free to use whatever means it chooses to discover that information and to print what it learns. That kind of trial by battle and cleaverness between the State and the press hardly seems the way best to further the various aims of a democratic society."

In speaking of the responsibility of all institutions in this country to work together to achieve mutual goals, Mr. Justice Frankfurter summed it up when he wrote:

> "No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. . . . In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was imbedded in the law."[13] *Pennekamp* v. *Florida,* 328 U.S. 331, 335-6 (1946) (Frankfurter, J., concurring).

A society which recognizes no check upon its freedom soon becomes a society where freedom is lost. This country was founded upon a system of checks and balances, and no

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[12] Id. at 278.

[13] The Virginia Constitution contains a provision that one must be responsible for the abuse of the right to free speech and the press. Article I, Section 12 of the Constitution of Virginia (1971).

institution, including the press, is free to use arbitrary power. If freedom of the press is used to undermine the confidence of the people in the institutions of our free society, our free society may die.

The restraint upon expression imposed by § 2.1-37.13 is narrowly limited, and is related solely to the purpose sought to be served by the legislature: the preservation of the confidentiality of Commission proceedings during the investigative process. Newspapers, such as Landmark, as well as any person are free to comment upon or criticize any judge as they deem necessary and appropriate. They are free to discuss the short comings of the administration of justice, and the fitness of any person to sit upon the bench. Section 2.1-37.13 provides no impediment to such expression. The robust reporting and criticism of the criminal justice system spoken of in *Nebraska Press Ass'n.* v. *Stuart, supra,* is clearly alive and well in the Commonwealth of Virginia. The judicial system as well as members of the judiciary are routinely subjects of debate and criticism. What is viewed in the public domain remains fair game for the press and public alike. The only matters which remain out of reach are the unfounded and unwarranted attacks upon the judiciary. The public need not wallow in spurious attacks upon the judiciary in order to form sound judgments about the administration of justice.

The cases relied upon for support by Landmark are inapposite to the issue underlying this case. *Virginia State Bd. of Pharmacy* v. *Virginia Citizen's Consumer Council,* 425 U.S. 748 (1976); *Bates* v. *State Bar,* 45 U.S.L.W. 4895 (U.S. June 27, 1977); and *Linmark Associates, Inc.* v. *Township of Willingboro,* 45 U.S.L.W. 4441 (U.S. May 2, 1977), all deal with restraints upon the free flow of commercial information. The publication of information which undermines the confidence of the people in the administration of

justice is simply unlike the hawking of one's wares in the marketplace.[14]

Neither *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), nor *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), lend support to Landmark. In neither of those cases was the Court confronted with the publication of materials expressly declared by constitution and statute to be confidential. Additionally, unlike the present case, each of those cases while dealing with criticism of public officials, the criticism was based upon information obtained in the public domain. Such criticism is not impeded by § 2.1-37.13.

II.

The Commonwealth Is Not Required To Produce Actual Facts To Show A Clear And Present Danger To The Administration Of Justice Where Such Determination Has Been Made In The State Constitution And Statute.

The principal thrust of Landmark's position is that before a state may punish a violation of a restriction upon expression, it must satisfy the "clear and present danger" test. This test, Landmark maintains, requires the state to prove by actual facts that the expression it seeks to prohibit would result in an evil which is substantial and imminent, posing a clear and present danger to a legitimate governmental interest. In support of its position, Landmark relies principally upon *Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1947); and *Wood* v. *Georgia*, 370 U.S. 375 (1962).

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[14] This same distinction may be applied to the cases of *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), and *Carey* v. *Population Servs. Int'l.*, 45 U.S.L.W. 4601 (U.S. June 9, 1977), relied upon by *amici curiae*.

After reviewing these cases, the Supreme Court of Virginia found them to differ substantially from the present case. Each of those cases was concerned with the common law power of a court to punish allegedly contemptuous out-of-court statements concerning pending cases. As recognized by this Court in *Bridges*, the imposition of sanctions in such circumstances was based upon a "concept of the most general and undefined nature." 314 U.S. at 260. This Court feared that without evidence of a clear and present danger, the undefined power of contempt would stifle fair criticism of the judiciary. As pointed out in Part I, the statute under attack does not stifle fair criticism of the judiciary.

Another important distinction between the cases relied upon by Landmark and the present case is amply pointed out in *Craig* v. *Harney*, 331 U.S. 367, 374 (1947):

> "A trial is a public event. What transpires in the courtroom is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. *Those who see and hear what transpired can report it with impunity.* There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." (Emphasis added.)

Standing in sharp contrast to the general and undefined power of contempt, so central to the decisions focused upon by Landmark, is the fact that the power of a Virginia court to punish out-of-court statements of the type at issue here is fixed by statute. The substantive offense for which punishment may be imposed is clear and well-defined. The fact that

the legislature has dealt with this question by statute raises this case to a level of legal dignity not enjoyed by the contempt judgments involved in *Bridges, Pennekamp, Craig* and *Wood*. Indeed, in *Wood*, this Court stated:

> "Initially, however, it should be noted that the Georgia courts have determined that the power to punish for contempt of court is inherent in its state judiciary . . . and the Court of Appeals thus ignored the express limitation imposed by the Georgia Legislature in punishing out-of-court statements. . . . This holding thus deprives the judgment of coming to this Court 'encased in the armor wrought by prior legislative deliberation'. . . ." 370 U.S. at 385-86.

This Court also recognized in *Bridges*, that a declaration of a State's policy weighs heavily in any challenge of the law as infringing constitutional limitations. In this regard, this Court said:

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the courtroom which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-308, such a 'declaration of a State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. . . .' [H]ere the legislature of California has not appraised a particular kind of situation and found a specific danger . . . sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that 'it must necessarily be found, as an original question,' that the specified publications involved created 'such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection.'" 314 U.S. at 260-61.[18]

Further support for the Commonwealth's position that the cases relied upon by Landmark are not controlling is found in Mr. Justice Douglas' opinion in *Craig*. After reviewing *Bridges, Pennekamp*, and other cases involving contempt, Mr. Justice Douglas stated:

> "Neither those cases nor the present one raises questions concerning the full reach of the power of the state to protect the administration of justice by its courts. The problem presented is only a narrow, albeit important, phase of that problem—the power of a court promptly and without a jury trial to punish for comment on cases pending before it and awaiting disposition." 331 U.S. at 373.

This case, unlike those cited by Landmark, comes to this Court not upon some uncircumscribed common law power of contempt, but springs from a clear and well-defined legislative declaration that breach of the confidentiality of Commission proceedings is so contrary to the public interest that it constitutes a substantive evil of immediate and serious peril to the orderly administration of justice and, therefore, should be punishable.

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[18] "By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. . . . The State cannot reasonably be required to measure the danger from every utterance in the nice balance of a jeweler's scale." *Gitlow* v. *New York*, 268 U.S. 652, 668-69 (1925).

The Virginia Supreme Court found that the reasons which prompted the creation of the Commission were much more than minor matters of public inconvenience or annoyance. They were found to be matters involving a serious and substantive evil—the imminent and substantial threat to the orderly administration of justice posed by the premature disclosure of the confidential proceedings of the Commission. Because of their importance to society, the Court found that no courtroom evidence was necessary to sustain their truth and validity.

That the Commonwealth was not required to produce actual facts to show a clear and present danger is supported by this Court's decision in *Dennis* v. *United States,* 341 U.S. 494 (1951). This Court in upholding a conviction under the *Smith Act* held that guilt is established by proof of facts, but the doctrine that there must be a clear and present danger is a judicial rule to be applied as a matter of law by the courts.

There is no legislative history, as this term is used in relation to federal legislation, dealing with the questioned statute. This does not mean, however, that legislative deliberation is lacking. The legislature is presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent. *McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802, 809, (1969).

History and experience have clearly shown that the methods of dealing with disabled or unfit judges by legislative impeachment or removal, existing prior to the creation of the Commission, were seldom used and generally unsatisfactory.[16] This state of affairs lead Virginia, as well as other states, to

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[16] *See In Re Diener,* 304 A.2d 587 (Md. 1973).

seek an alternative means of handling problem judges. This search for an alternative gave birth to commissions to investigate complaints against judges.[17]

A commission or other bodies to investigate complaints against judges have now been adopted in forty states and the District of Columbia and Puerto Rico. A list of these jurisdictions with their enabling legislation is set forth in a footnote on page 39 of Appellant's brief. These jurisdictions by constitution, statute or rule impose a requirement of confidentiality in commission proceedings.[18] The Supreme Court of Virginia found that the requirement of confidentiality in Commission proceedings (1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious. (JA 72-73).

These reasons found by the Supreme Court of Virginia to justify the requirement of confidentiality are supported by court decisions and legal writers alike.[19] These reasons are

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[17] Gasperini, Anderson, and McGinley, *Judicial Removal in New York: A New Look,* 40 Ford.L.Rev. 1 (1970); Braithwaite, *Who Judges the Judges?* (Am. Bar Found. 1970).

[18] There is presently pending in Congress a bill to establish a federal Council on Judicial Tenure. H.R. 1850, 95th Cong., 1st Sess. (1977). This bill would also require confidentiality in such proceedings.

[19] *McCartney* v. *Commission on Judicial Qualifications,* 116 Cal. Rptr. 260, 526 P.2d 268 (1974); *Nichols* v. *Gamso,* 382 N.Y.S.2d 755 (Ct. App. N.Y. 1976); *Forbes* v. *Earle,* 298 So.2d 1 (Fla. 1974); Note, *Remedies For Judicial Misconduct and Disability: Removal*

exemplified by the Supreme Court of Florida in *Forbes* v. *Earle*, 298 So.2d 1, 4 (1974):

> "The purpose is to process complaints concerning the judiciary from any and all sources, while requiring confidentiality as a means to protect both the complainant from possible recriminations and the judicial officer from unsubstantiated charges. . . . Eliminating the confidentiality of these proceedings would also eliminate many sources of information and complaints received by the Commission not only from lay citizens and litigants but also from lawyers and judges within the system."

Landmark asserts that the first two reasons found to support the requirement of confidentiality, while significant, are insufficient to support sanctions on truthful reporting about individual judges or the judiciary as a whole. The Commonwealth fully concurs in this judgment of Landmark as it pertains to information gained in the public domain. Cases decided by this Court establish this proposition beyond peradventure. But, it is one thing to print information obtained in open hearings, and quite another to print information declared to be confidential.

The creation of the Commission was for the express purpose of giving the people a method by which errant judges could be effectively disciplined. The Commission was not created to give disappointed litigants and others a platform upon which to vent their spleens against judges, and thereby

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and Discipline of Judges, 41 N.Y.L.Rev. 149 (1966); Note, *The Commission Removal Plan: A Corrective Remedy for Judicial Misconduct in Iowa*, 55 Iowa L.Rev. 1020 (1969); W. Braithwaite, *Who Judges the Judges?* (Am. Bar Found. 1970); Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, 3 U.S.F.L.Rev. 244 (1968-1969).

to lend some aura of official status to their epitaphs. A study has shown that about two-thirds of the complaints received by commissions are *prima facia* trivial. W. Braithwaite, *Who Judges the Judges?*, 162-163.

The proceedings are an inquiry into the conduct of judges the aim of which is the maintenance of the honor and dignity of the judiciary and the proper administration of justice rather than punishment of the individual. *In Re Diener*, 304 A.2d 587 (Md. 1973); *In Re Kelly*, 238 So.2d 565 (Fla. 1970).

The mere existance of the Commission and the threat of possible action solve many problems. In the preliminary investigative stage, confidentiality allows for corrective action to be taken short of censure, reprimand or removal. In those cases where termination of service is warranted because of mental or some physical ailment, confidentiality allows the judge to avoid the spectacal of a public trial by resigning or retiring. Confidentiality also facilitates discipline for "minor" misconduct not serious enough to warrant public censure. Publicizing incidents of minor misconduct serves no purpose in most cases, and contrition and cooperation from the judge are more likely if he is not made needlessly to suffer a public recitation of his professional or personal failings.

This very reasoning was addressed by the Court in *Nichols* v. *Gamso*, 382 N.Y.S.2d 755 (1976):

> "Implied in the imposition of a sanction short of removal is the conclusion that continuation in judicial service will be in the public interest. It would then be inconsistent, in the absence of weighty contraindication, to expose the Judge to disclosure of accusations, which in the light of the limited disciplinary determination are rationally irrelevant but might lead to unfair prejudice and notoriety, thereby without warrant impair-

ing his capability to render effective judicial service in the future."

In *People* v. *Culkin,* 162 N.E. 487 (N.Y. 1928), a case involving dicipline of an attorney, Chief Justice Cardozo provided sound reasons for confidentiality in Commission proceedings:

> "The argument is pressed that, in conceding to the court a power of inquisition, we put into its hands a weapon whereby the fair fame of a lawyer, however innocent of wrong, is at the mercy of the tongue of ignorance or malice. Reputation in such a calling is a plant of tender growth, and its bloom, once lost, is not easily restored. The mere summons to appear at such a hearing and make report as to one's conduct may become a slur and a reproach. Dangers are indeed here, but not without a remedy. The remedy is to make the inquisition a secret one in its preliminary stages." 162 N.E. at 492.[20]

Public understanding of the judicial processes can best be obtained through the discussion of matters which have reached the level of verified complaints. The public interest is not served by discussion of unfounded allegations of misconduct which defame honest judges. Such discussion serves only to demean the administration of justice and renders the courts all suspect to the public, thereby increasing disrespect for law and order. *In Re Kelly, supra.* Courts, be they high or low, should and must be like Caesar's wife, above suspicion. Any other standard is one which undermines the trust and confidence of the average citizen in the administration of justice.

Landmark asserts that the third justification for the statute

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[20] *See, Anonymous Nos. 6 and 7* v. *Baker,* 360 U.S. 287 (1959).

is likewise insufficient. This purpose is to protect complainants and witnesses from possible recrimination for bringing matters to the attention of the Commission. It goes without saying that the Commission would not and could not function if citizens were in fear of reprisals should they make a complaint.

In practice, the name of the complainant is never made known to the judge under investigation. When a complaint is received, a preliminary investigation is conducted to ascertain whether there is any substance to the complaint. If evidence is found to warrant a formal hearing, it is the Commission, not the complainant, who prefers charges against the judge. The complainant's name remains secret even in those cases which are filed with the Supreme Court, since the name of the original complainant is never made a part of any public record.

The fact that confidentiality is essential to protect the name of a complainant is attested to by studies in which attorneys clearly indicated that they would hesitate to complain about a judge if their identity as complainants might become known. Note, *Remedies For Judicial Misconduct and Disability: Removal and Discipline of Judges,* 41 N.Y.L. Rev. 149, 194 (1966); W. Braithwaite, *Who Judges the Judges?,* 162, 163.

As noted by the Supreme Court of Virginia, the rule of confidentiality also protects witnesses prior to the determination that the complaint is meritorious. Landmark maintains this justification is insufficient to sustain the statute. As Landmark points out, once a formal hearing is conducted, the judge obviously becomes aware of any witnesses who give evidence before the Commission. This is necessarily so because in our society it would be unthinkable to remove a judge from office without his having had the opportunity to confront the witnesses against him.

The interest served by this justification is to encourage lay persons as well as attorneys to come forward in the preliminary stages of an investigation and supply information which will assist the Commission in determining the merits of the complaint. In those instances where it is determined that the complaint is without sufficient merit to warrant further action, those persons who came forward should not be placed in the possible position to suffer recrimination at the hands of the judge. It may well be that the information furnished by witnesses during the preliminary stages of an investigation may point up some "minor" misconduct on the part of a judge which would not warrant public censure. In these situations, the Commission can take corrective action and the anonymity of the witnesses is maintained and thereby their interests protected. Witnesses whose identities become known at formal hearings have their interests protected by the Commission and the courts.

It is true, as pointed out by Landmark, that the article published in this case did not reveal the name of any witness to Commission proceedings. It is not true, however, as Landmark asserts, that actual events in Virginia have shown that press coverage of Commission proceedings has provided witnesses with protection against the risk of reprisal. In an article carried in the Richmond News Leader on May 4, 1977), see copy of article attached, page 41) not only was the name of a witness published, but the article went on to disclose the name of the attorney and his firm who had initiated the complaint. This article points out all too clearly the need for the statute.

The authorities agree that confidentiality is necessary to protect complainants and witnesses.[21] In the case of *McCartney* v. *Commission on Judicial Qualifications,* 526 P.2d

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[21] *See,* note 19 *supra.*

268 (Cal. 1974), the court upheld the confidentiality requirements even when the subject judge requested an open hearing. In reaching its conclusion, the Court held:

> "This state has adopted a constitutional policy that proceedings before the Commission shall be confidential. . . . While such a policy undoubtedly was adopted in part to protect the particular judge charged with misconduct and might, therefore, arguably be waived by him, we recognize that the provision for confidentiality also protects witnesses and citizen complainants from intimidation. Inasmuch as confidentiality is constitutionally authorized, is based on sound reason, and is imposed in proceedings which are neither criminal nor before a 'court of justice' we perceive no impropriety in the Commission's refusal to open the hearings before the special masters to the public." 526 P.2d at 274.

Landmark asserts that the restriction on reporting is not the narrowest means of protecting witnesses and suggests alternatives. Landmark suggests that lawyer-witnesses might be protected by disqualification rules as to the judge under investigation. The Commonwealth submits this is hardly a viable alternative. If such a rule were adopted, then any attorney could engage in judge shopping by merely filing a complaint against a judge whose view of the law was inconsistent with that of the attorney. Such a situation would hardly serve the public interest.

Landmark also suggests that the interests of other witnesses might be protected by a monitoring program. The Commonwealth submits such a program offers less protection than confidentiality. Witnesses already have available to them the Commission to monitor cases of retribution. Retribution can take many subtle forms which a monitoring program could not realistically be expected to uncover. Therefore, confidentiality offers the best protection to witnesses.

As pointed out by Landmark, only Virginia and Hawaii make it a crime to disclose any part of Commission proceedings. It should be noted, however, that Minnesota, New Mexico and Wyoming punish violations of a witness' oath as a contempt. Whether other states seek to impose criminal sanctions is irrelevant. Virginia has merely provided the means necessary to effectuate its policy. To declare that Commission proceedings are to be confidential without providing the means of enforcement has a hollow ring, as this case fully attests.

The reasons for adopting the Commission and confidentiality have been shown by history and experience to be justified. The legislature of Virginia clearly was aware of these circumstances at the time of the adoption of § 2.1-37.13. These circumstances were the subject of great discussion during the passage of Virginia's new Constitution in 1971. Thus, this statute comes to this Court "encased in the armor wrought by prior legislative deliberation."

Forty-two jurisdictions have found it necessary to establish some type of judicial disciplinary procedure. Nearly half of these have done so by constitutional provision. Confidentiality is the hallmark of these proceedings, and to say that confidentiality is not justified is to denigrate the collective judgment of the people. The citizens of Virginia made the judgment that confidentiality in such proceedings was in the public interest when it adopted the new Constitution in 1971, and now the press would seek to deny that judgment.

> "Free-speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment." *Dennis* v. *United States,* 341 U.S. 494, 539-40 (1951) (Frankfurter, J., concurring).

III.

Virginia Code Section 2.1-37.13 Is Not Unconstitutionally Vague Or Overbroad.

Landmark argues that the statute is vague in several respects. First, it is urged that the statute is ambiguous in that it is unclear what constitutes "divulgence". As found by the Supreme Court of Virginia, the word "divulge" means to disclose or to make known. The Commonwealth submits this is the common everyday definition of that term and is accepted as such. Landmark urges that since the word "divulge" also has a meaning limited to the first act of disclosure, the statute does not give fair warning of what activity is proscribed.

The fact that a word may have more than one meaning, which can be said of almost any word, does not render the statute unconstitutional. The intention of the legislature must be examined in order to see how the word harmonizes with the object of the statute. In *Northrop* v. *Richmond,* 105 Va. 335, 53 S.E. 962 (1906), the Supreme Court of Virginia, citing Mr. Justice Story, addressed this issue and said:

> "Where a word is used in a statute, which has various known significations, I know of no rule that requires the Court to adopt one in preference to another simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intention of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature." 105 Va. at 339.

In discussing statutory construction, this Court in *Vermilya-Brown Co.* v. *Connell,* 335 U.S. 377, 386 (1948), stated:

> "Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed."

When the word "divulge" is read in context with the other language of the statute, it can only mean that it is prohibited to disclose or to make known information concerning Commission proceedings prior to the filing of a complaint in the Supreme Court. To ascribe to the word "divulge", the limited meaning of the first act of disclosure would be to eviscerate the statute. What purpose could possibly to served by the statute if you can read about confidential Commission proceedings on the front page of the newspaper?

Landmark also urges that the statute is vague in that it fails to make clear an intent to include newspaper reports. A look at the language of the statute itself discloses the weakness of this argument. In unmistakeable terms, the statute provides for the confidentiality of Commission proceedings, including the identification of the subject judge and provides that this information "shall not be divulged by *any* person to *anyone* except the Commission." The statute further provides that "*any* person"[22] who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor." Had the legislature intended to exempt newspaper reports from the applicability of this statute, it would

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[22] Landmark, although a corporation, is included within the meaning of person. *See*, Section 1-13.19, Code of Virginia (1950), as amended.

have clearly said so. An exemption to newspapers would defeat the entire purpose of the legislation.

The legislation itself clearly recognizes certain exemptions. The requirement of confidentiality is not intended to apply to a subject judge when discussing such proceedings with his attorney, § 2.1-37.12 and Rule 6, Rules—Judicial Inquiry and Review Commission, 215 Va. 937, and when information is requested by the Legislature, § 2.1-37.17:1.

The English language has its limits, and this statute speaks clearly except to those few who would use tunnel vision when examining it. In *CSC* v. *Letter Carriers*, 414 U.S. 548, 578-79, this Court said:

> "[T]here are limitations to the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. '[T]he general class of offense to which . . . [the provisions are] directed is plainly within [their] terms . . ., [and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise.'"

In the area of examining state statutes for vagueness, this Court laid down the following rule in *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972):

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."

Here the language utilized gives fair warning to the ordinary person exercising ordinary common sense that the divulgence of confidential information regarding Commission proceedings is prohibited. There is no lack of notice in this statute, nothing to entrap or fool the unwary.

Landmark finally asserts that the statute is overboard, and suggests some hypothetical situation which it believes supports this argument.

There is a danger in trying to judge statutes in terms of hypothetical applications since the court risks rendering decisions founded upon conjecture. The importance of having a concrete issue derives partly from the importance of having a record upon which to arrive at an informed judgment. "It is the law as applied that we review, not the abstract, academic questions which it might raise in some more doubtful case." *Bigelow* v. *Virginia*, 421 U.S. 809, 830 (1975) (Rehnquist and White, J.J., dissenting)."

It is suggested that if a witness felt that a judge had taken retribution against him for giving testimony, his disclosure of this fact to anyone other than the Commission itself or even the bringing of a law suit to redress this grievance would be subject to criminal sanctions, as would the reporting of such events. The Commonwealth believes that the interest of the witness in being able to report such matters to the Commission is ample protection. Actual events have shown that a witness who finds himself in such circumstances can also seek relief from the courts. This is illustrated by such a case as referred to in the Appellant's Brief 31. In that case, the witness has filed suit alleging intimidation, and the newspapers have reported this fully. Neither the witness

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" *See Baggett* v. *Bullitt*, 377 U.S. 360, 383 (1964) ("[t]o conjure up such ridiculous questions . . . is to build up a whimsical and farcical straw man which is not only grim but Grimm.") (Clark, J., dissenting).

nor the newspaper have been charged with any violation of the statute.

It has been suggested by *amici* that the statute would prevent a witness from revealing Commission matters to his attorney, and would prevent the reporting of a bribe. Again, actual events belie the first concern. The records of the cases which have become public upon being filed with the Supreme Court show that the Commission has permitted witnesses to appear with counsel, and the Commonwealth has never considered this to be a violation of the statute. The Commonwealth would also submit that it would not be a violation of the statute to report to law enforcement officials or for the newspapers to print the allegation of a bribe. This could clearly be done in a way to avoid revealing any confidential information, and it has never been shown that the Commonwealth would use this statute to suppress information of a criminal act.

Declaring a statute facially unconstitutional because of overbreadth "is, manifestly, strong medicine" and "has been employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application.

The Commonwealth submits that actual events establish that the questions raised as to the overbreadth of this statute are unwarranted and unfounded. The Supreme Court of Virginia has not been confronted with any of these hypothetical suggestions by concrete facts, and this Court should not strike down this statute on the basis of "irrational imaginings". *Aptheker* v. *Secretary of State*, 378 U.S. 500, 525 (1964) (Clark, J., dissenting).

CONCLUSION

Freedom of the Press is without doubt one of the hallmarks which separates this Country from the rest of the World. Such freedom, however, is not an absolute, and cannot be allowed to destroy the effectiveness of the Commission for judicial discipline and threaten the orderly administration of justice. The State has both the duty and the right to protect its institutions. When the State has taken steps to remove important and sensitive matters from the public domain, and has declared such matters to be confidential, then the State has the right to punish those who would do it damage by breaching that confidentiality.

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Assistant Attorney General of Virginia, and a member of the Bar of this Court, do hereby certify that three printed copies of the foregoing Brief of the Appellee were mailed, post pre-paid, this 30th day of August, 1977, to each of the following:

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APPENDIX

Richmond News-Leader, Wed., May 4, 1977.

Va. Panel Weighs Evidence on Judge

By SUZANNE WOOTON

The State Judicial Inquiry and Review Commission reportedly is weighing testimony given during at least four secret hearings on complaints against Henrico General District Court Judge H. Ratcliffe Turner.

The five-man commission must determine whether the complaints against Judge Turner are serious enough to be filed with the Virginia Supreme Court. If the group decides to file the complaints, it could ask the high court to censure, remove or retire the judge.

However, the commission has filed complaints against state judges only three times since it was established in 1971. In two of those cases, the group recommended that the high court censure the judge involved.

In the two final days of hearings here last week, the commission reportedly heard testimony from witnesses called by Judge Turner's lawyers. Henrico Commonwealth's Atty. Donald R. Howren and several assistant commonwealth's attorneys reportedly were among those witnesses.

The witnesses reportedly were questioned about the 51-year-old judge's general courtroom demeanor and judicial conduct. During two secret hearings here in late March, the commission reportedly was told that Judge Turner repeatedly was late for court and that he has made improper comments from the bench.

The commission also is probing a number of other complaints, including one filed last fall by Richmond attorney Murray Janus which prompted the commission's initial investigation of Judge Turner.

Janus, a member of the law firm of Bremner, Baber and Janus, reportedly complained that Judge Turner raised the bond for a client of Janus' firm when the client requested a continuance of his case because his lawyer could not be present.

FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

REPLY BRIEF OF APPELLANT

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S. 1423, 95th Cong., 1st Sess. (1977) 5n

U.S. Const.

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In the

Supreme Court of the United States

October Term, 1977

No. 76-1450

Landmark Communications, Inc.,

Appellant,

v.

Commonwealth of Virginia,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

REPLY BRIEF OF APPELLANT

At the heart of this appeal is an utterly irreconcilable dispute between Landmark and the Commonwealth of Virginia as to the essence of First Amendment protection. In this reply brief, we simply highlight the nature of that dispute, leaving to our main brief discussion of subsidiary issues raised by the appeal.

"If freedom of the press is used to undermine the confidence of the people in the institutions of our free society," the Commonwealth argues, "our free society may die." (Bf. 19) What is unprotected under the First Amendment, the Commonwealth argues, are "unfounded", "unwarranted" and "spurious attacks upon the judiciary . . . information which undermines the confidence of the people in the administration of justice" (Bf. 19-20); what is protected, the Commonwealth argues, is "fair criticism of the judiciary" (Bf. 21), criticism which does not "undermin[e] the trust and confidence of the average citizen in the administration of justice". (Bf. 28)

These are not irrational statements; they are not unreflective of some approaches, elsewhere in the world, to the governance of nations. But such assertions are, quite simply, at war with the First Amendment this nation has come to know.

It is hardly a matter of continuing constitutional dispute that "[s]uppression of the right of the press to praise or criticize governmental agents . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free".* Nor is the assumption sustainable "that respect for the judiciary can be won by shielding judges from published criticism", since "an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." ** Yet the Commonwealth seriously puts it forth that press freedom must yield when its exercise may "undermine . . . confidence" in the very governmental body being scrutinized by the press.***

It has recently been established by decisions of this Court that even commercial speech will, if true, be afforded

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* *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966).

** *Bridges* v. *California*, 314 U.S. 252, 270-71 (1941).

*** While it is by no means a precondition to the invalidity of the statute at issue on this appeal, the statute does, in fact, punish criticism which is, by any definition "warranted". Thus, a newspaper may be punished for discussing prior Commission proceedings against a judge who resigned from the Bench under pressure and then runs for public office again. It can hardly be contended that comment on his record is unwarranted in such circumstances. Similarly, a judge who is let off with a reprimand, where some might think harsher penalties in order, would be protected against press criticism under the Commonwealth's position—as would the Commission. It is hard to imagine how such criticism can possibly be deemed unwarranted.

a high degree of First Amendment protection; for the Commonwealth to assert that these decisions (discussed at pages 16-18 of our main brief) afford protection for the "hawking of one's wares in the marketplace" (Bf. 20) but *not* for the truthful speech at issue with respect to the performance of public officials in their public duties, misapprehends the entire thrust of both the commercial speech cases and other cases (such as this) involving a still higher degree of First Amendment protection.* This Court's conclusion in *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964) that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned" governs this appeal. For the Commonwealth to contend that *Garrison* does not "lend support to Landmark" (Bf. 20) is simply to ignore *Garrison*, not to distinguish it.**

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* The Commonwealth's misreading of the commercial speech cases is consistent with its misapprehension of the later history of cases such as *Gitlow* v. *New York*, 268 U.S. 652 (1925). The majority opinion in *Gitlow*—now relied upon by the Commonwealth (Bf. 23, n. 15)—was dissented from in an opinion of Justices Holmes and Brandeis so memorable in nature that "it would be disingenuous to deny that the dissent . . . had been treated with the respect usually afforded to a decision." *Dennis* v. *United States*, 341 U.S. 494, 541 (1950) (Frankfurter, *J.*, concurring). We note, in passing, that the Commonwealth's interpretation of *Dennis* itself (Bf. 24) is flatly inconsistent with the holding of that case. See our main brief at 35-37.

** The attempted distinction of *Garrison* by the Commonwealth is based upon the fact that the seditious libel there alleged was not required by statute to be kept "confidential" and that the views there expressed had been "based upon information obtained in the public domain." (Bf. 20) The first distinction is simply without meaning: the Louisiana criminal libel statute at issue in *Garrison* forbade free expression, just as the Virginia statute does in this case. The second purported distinction assumes that if the material used to criticize the judiciary in *Garrison* had not been in the public domain, the Louisiana statute would have been held constitutional, even though it exacted criminal punishment for the publication of truthful statements about public officials; nothing in *Garrison*, however, either suggests or would permit such a result.

Much of the Commonwealth's argument is dependent upon the notion that the decision as to what may be printed about activities of the State is one which the State itself and not the press may make. If *it* chooses, so the Commonwealth argues, it may not only determine not to release information to the public, but to punish for such disclosure as "may reasonably be thought to be inconsistent with the public interest."* (Bf. 10) Such a view is not only at odds with those cases carefully limiting criminal punishment of otherwise free expression to "narrowly limited classes of speech", *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571 (1942); it is so open ended as to permit criminal punishment for the publication of virtually anything a state would prefer to have go unsaid. Such views are hardly unique in a world in which press freedoms diminish further by the day.** They are utterly inconsistent with an approach as "intensely skeptical" as is that of this country to the adoption of "measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 259 (1974) (White, J., concurring).

As articulated by the Commonwealth, what it may keep confidential it may criminally punish the press for publishing; the contrary result, the Commonwealth urges, leads to a "kind of trial by battle and cleaverness *(sic)* between the State and the press" which "hardly seems the best way to further the various aims of a democratic society." (Bf.

* Significantly, this asserted standard departs from even the less than fulsome protection the clear and present danger standard—elsewhere embraced by the Commonwealth—mandates. Such a disregard of even the minimal protection afforded by the clear and present danger standard reflects the fundamental lack of interest in, and deference to, free expression which informs the Commonwealth's defense of the statute involved in this case.

** See, P. Galliner, *Annual Review of World Press Freedom* 7 (Int'l Press Institute 1976).

18) The difficulty with this submission, however, is that it wrongly equates the power of the Commonwealth to direct its own officials not to release information with a claim of power to punish the press for breach of confidentiality.* It is true that it would be far tidier—and that the State could stand far more assured that *nothing* would "leak"—if publication could be as easily punished as the Commonwealth desires. But it is just that kind of draconian and, ultimately, repressive logic that is rejected by First Amendment history.**

Much in the Commonwealth's brief is simply confused or misleading,*** but we leave detailed exposition of our

* As stated in our main brief, notwithstanding the routine presence of confidentiality provisions in state statutes establishing judicial fitness commissions, the only other state to have adopted any provision similar to that of Virginia is Hawaii. In that state, an individual who filed a complaint against a judge alleging his unfitness for the bench, was advised by the Hawaii Commission for Judicial Qualification that it would constitute a felony under H.R.S. § 610-3(b) if he disclosed *any* information about the charges filed by him. Thus, the effect of filing the charge was that of precluding the complainant—in perpetuity—from discussing his charges or the justness of their disposition by the Hawaii Commission. The complainant sought declaratory relief against the state on First Amendment grounds. The state's motion for summary judgment was granted (without written opinion) on April 20, 1977 and the case is now awaiting argument before the Supreme Court of Hawaii. *Parrington* v. *Hawaii,* Civ. No. 49320 (Cir.Ct. First Cir. 1977)

Although the various federal bills dealing with judicial discipline include confidentiality provisions, none contains any provision similar to that adopted in Virginia or Hawaii. *See,* H.R. 1850, 95th Cong., 1st Sess. (1977); S. 1423, 95th Cong., 1st Sess. (1977).

** As recently phrased by Attorney General Bell, "The press is not entitled to get a leak, but if they get one they have a right to print it." *The Atlanta Constitution,* Nov. 17, 1977, p. 2-A.

*** By way of example, at one point, the Commonwealth urges that under its statute the name of a complainant "is never made known to the judge under investigation"; later on the same page, the Commonwealth concedes that once a formal hearing is commenced, a judge is advised of the identity of all who testified before the Commission. (Bf 29) At still another point, the Com-

position to our main brief. What is fundamentally flawed in the Commonwealth's position is its underlying premise, a premise illustrated by its assertion that "[t]he public interest is not served by discussion of unfounded allegations of misconduct which defame honest judges . . . Courts, be they high or low, should and must be like Caesar's wife, above suspicion." (Bf. 28)

Such views are, we submit, as profoundly dangerous as they are constitutionally erroneous. It is not for the Commonwealth to decide when the "public interest" is best served by discussion—or the lack of it—as to the conduct of elected public officials. It is not for the Commonwealth to determine which "allegations of misconduct" of such public officials may or may not be discussed. And it is not for the Commonwealth to attempt to compel respect for any public official by fiat, let alone fiat which subjects to criminal sanctions all who report that such respect has not yet been universally achieved.

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monwealth urges that Landmark's demonstration of the constitutionally fatal overbreadth of the statute is too "hypothetical" and congratulates itself for its restraint in not indicting a witness before the Commission who sought court protection against a judge who fired her after her testimony—and in not indicting the newspaper which published the story. (Bf. 36-37) What the Commonwealth fails to state is that it *opposed* the temporary restraining order which protected Landmark from prosecution for publishing the story. In fact, much of the Commonwealth's opposition to the overbreadth argument appears to be directed at the very concept of overbreadth, ignoring the fact that all overbreadth arguments involve showings "that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973).

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1450

LANDMARK COMMUNICATIONS, INC., *Appellant*

v.

COMMONWEALTH OF VIRGINIA, *Appellee*

On Appeal From The Supreme Court of Virginia

BRIEF AMICUS CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1450

LANDMARK COMMUNICATIONS, INC., *Appellant*

v.

COMMONWEALTH OF VIRGINIA, *Appellee*

On Appeal From The Supreme Court of Virginia

BRIEF AMICUS CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submits this brief *amicus curiae* in support of Appellant Landmark Communications, Inc. Both parties to this suit have given their written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,240 newspapers constituting over 90 percent of

the total daily and Sunday newspaper circulation, and a significant portion of the weekly newspaper circulation, in the United States. Two daily newspapers owned by Appellant Landmark Communications, Inc., as well as twenty-two other newspapers published throughout the state of Virginia, hold membership in ANPA. Concerned with issues of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members informed of, and to provide meaningful input on, matters touching on these concerns.

In that regard, the Association's member newspapers, individually and through ANPA, are ever vigilant to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest. In attempting to achieve that end, ANPA wishes to present for this Court's consideration its views as to the constitutionality of the proceedings below, which resulted in the criminal conviction of the publisher of one of its member newspapers for its truthful publication on "a matter that is both newsworthy and of great public importance." *Pell* v. *Procunier,* 417 U.S. at 830, n.7 (1974).

QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENTS OF THE CASE

ANPA adopts the questions presented, constitutional provisions involved and statement of the case, as set forth in Appellant's brief. ANPA strongly supports and adopts the position of Appellant herein.

Additionally, however, ANPA believes that this case involves the imposition of a prior restraint on publication and that the decision below should be reversed on that basis, as well. We can think of no clearer, more forceful deterrent to publication than the criminal sanctions set forth in the questioned statute.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of Virginia below upholds the constitutionality of Virginia Code § 2.1-37.13, which authorizes criminal prosecution for the mere publication of the fact that a "Judge of a Court not of record . . . was the subject of an investigation and hearing by the Judicial Inquiry and Review Commission". Your *amicus* respectfully submits that the opinion below thereby upholds a substantial and impermissible infringement of Appellant's First Amendment rights. For it is the right and the responsibility of the press to publish truthful information on the operations and administration of state government. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 491-492, 495 (1975); *New York Times Co.* v. *Sullivan,* 376 U.S. at 270 (1964); *Garrison* v. *Louisiana,* 379 U.S. at 74 (1964). Appellee asserts that a competing societal interest is served by § 2.1-37.13—that is, protecting the confidentiality of matters, preliminarily submitted to the Commission, relating to the possible imposition of disciplinary sanctions against members of the state judiciary. This salutary state interest, however, fails to overcome the First Amendment's protection of Appellant's fundamental right to publish. The publication here at issue is not "unprotected speech." Moreover, there has been no showing that the asserted interest in confidentiality is compelling or that § 2.1-37.13 is necessary to the accomplishment of such a compelling interest. Finally, there has been no express finding—

by the trial court, the Supreme Court of Virginia, or by the Virginia legislature in its enactment of the statute—that either the entire class of comments proscribed under § 2.1-37.13, or Appellant's specific publication of October 4, 1975, constituted a "clear and present danger", *Schenck* v. *United States,* 249 U.S. at 52 (1919), or "a serious and imminent threat", *Craig* v. *Harney,* 331 U.S. at 373 (1947), of a substantive evil. For these reasons alone, § 2.1-37.13 "fails to clear the barriers of the First Amendment". *Miami Herald Publishing Company* v. *Tornillo,* 418 U.S. at 241 (1974).

Beyond that, however, it is respectfully submitted that § 2.1-37.13 induces excessive caution in the publication of comment on public issues and thereby imposes a serious prior restraint on publication. As such, this statutory provision bears a heavy presumption of invalidity, *New York Times Co.* v. *United States,* 403 U.S. at 714 (1971), which cannot be overcome.

Finally, your *amicus* acknowledges that, in a very rare circumstance and if necessary to achieve a compelling state interest, a state may limit the access of the press and the public to certain sources of information. In the absence of a finding that Appellant has violated a valid criminal statute in obtaining "confidential" information concerning preliminary investigations of the Virginia Judicial Inquiry and Review Commission, there is no valid basis for punishing the act of its subsequent publication. Wherefore, Virginia Code § 2.1-37.13, both on its face and as applied to Appellant below, is unconstitutional; Appellant's conviction below must be overturned.

ARGUMENT

I. APPELLANT'S PUBLICATION CONCERNING THE PRELIMINARY PROCEEDINGS OF THE VIRGINIA JUDICIAL INQUIRY AND REVIEW COMMISSION IS SPEECH PROTECTED UNDER THE FIRST AMENDMENT

Your *amicus* respectfully submits that Appellant's publication, in the October 4, 1975 *Virginian-Pilot,* of the fact that a hearing had been conducted by the Virginia Judicial Inquiry and Review Commission concerning possible disciplinary action against a state Juvenile and Domestic Relations Court Judge clearly was speech protected under the First Amendment. The subsequent prosecution and conviction of Appellant under authority of Section 2.1-37.13 of the Code of Virginia therefore was in patent derogation of both the intent of Framers of the Bill of Rights and this Court's judicial pronouncements on the scope and application of the First Amendment. For if the enactment of the First Amendment was to serve any purpose, it was to improve upon the British system whereby the Crown sought to insulate itself from adverse comment by means of newspaper taxes, licensing laws and seditious libel, and to enlarge and expressly sanction the right of the press, and of every citizen, to comment on the operations of government:

> For more than a century prior to the adoption of the [First] amendment—and, indeed, for many years thereafter—history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the agencies and operations of the government. The struggle between the proponents of measures to that end and those who asserted the right of free expression was contin-

uous and unceasing. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 245 (1936).

In 1774, the Continental Congress, seriously weighing the option of pursuing political independence, sent a letter to the Inhabitants of Quebec (October 26, 1774), seeking their advice and support. The Continental Congress referred to the "five great rights" and said:

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honorable and just modes of conducting affairs. Journal of the Continental Congress, 1904 Ed., Vol. 1, pp. 104, 108.

Thus,

> One of the objects of the revolution was to get rid of the English common law on liberty of speech and the press.
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> • • •
>
> Liberty of the Press as declared in the First Amendment, and in the English common law crime of seditious libel cannot co-exist. Schofield, *Essays on Constitutional Law and Equity,* 521-522, 535 (1972).

And, in 1789:

> No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly and petition than the people

> of Great Britain had ever enjoyed. *Bridges* v. *California,* 314 U.S. 252, at 265 (1941).

Thus, the historical record of the intent of the framers makes it evident that the First Amendment generally was intended to protect publication by the press concerning the activities of governmental officers and agencies. This view of its intent and function has been confirmed in numerous subsequent cases decided by this Court. Speaking for the majority of the Court in *Mills* v. *Alabama,* 384 U.S. 214, at 218-19 (1966), Justice Black stated:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. . . . *Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials.* . . .

The Commonwealth of Virginia has asserted, however, that the restraint on publication imposed by § 2.1-37.13 is necessitated by the fact that "there are privacy interests to be protected in judicial [i.e., Commission] proceedings" and Virginia "must respond by means which avoid public documentation or other exposure of private information." Appellee's Motion to Affirm the Judgment of the Supreme Court of Virginia, pp. 3-4, citing *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, at 496 (1975). Of course, the mere assertion, and even existence, of a state interest in

maintaining the secrecy of preliminary proceedings before the Judicial Inquiry and Review Commission will not suffice. Given the fact that § 2.1-37.13 completely suppresses the dissemination of even truthful information about the Commission's preliminary proceedings, it abridges the freedom of speech and the freedom of the press, which are "fundamental liberties". *Gitlow* v. *New York,* 268 U.S. 652, 666 (1975). Statutes that intrude upon fundamental liberties are not given the same presumption of constitutionality which this Court usually accords to legislation. See *United States* v. *Robel,* 389 U.S. 258, 277 (1967).

> [W]here fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling,' *Bates* v. *Little Rock,* 361 U.S. 516, 524, 4 L.Ed.2d 480, 486, 80 S.Ct. 412. The law must be shown 'necessary, and not merely rationally related, to the accomplishment of a permissable state policy.' *McLaughlin* v. *Florida,* 379 U.S. 184, 196, 13 L.Ed.2d 222, 231, 85 S.Ct. 283. *Griswold* v. *Connecticut,* 381 U.S. 479, 497 (1965) (Goldberg, J., concurring opinion).

In numerous other cases, some of which also involved aspects of unconstitutional overbreadth or vagueness, a variety of assertedly "substantial" governmental interests were not found to justify a complete ban on a particular exercise of the fundamental freedoms of speech and press. See, *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) (individual privacy); *Bigelow* v. *Virginia,* 421 U.S. 809 (1975) (the assurance of quality medical care); *Carey* v. *Population Services International,* 45 U.S.L.W. 4601 (1977) (public health and the prevention of sexual promiscuity among juveniles); *U. S.* v. *Columbia Broadcasting System,* 497 F.2d 102 (5th Cir. 1974) (maintaining a "dispassionate forum essential for a trial"); *Mills* v. *Alabama,* 384 U.S. 214 (1966) ("protection of the public from . . . propaganda in an effort to influence voters on election day"); *Lewis* v. *Baxley,* 368 F.Supp. 768, 779 (M.D. Ala. 1973) ("protection of the public from interested and improperly influenced news coverage and protection of the legislature from surreptitious lobbying by newsmen").

Moreover, in assessing the constitutional validity of a statute which abridges free speech in an attempt to preserve the fair administration of justice, "the question . . . is whether the words are used in such circumstances and are of such a nature *as to create a clear and present danger", Schenck* v. *United States,* 249 U.S. 47 at 52 (1919), or *"a serious and imminent threat* to the administration of justice". *Craig* v. *Harney,* 331 U.S. 367, 373 (1947) (emphasis added).

The burden of justifying § 2.1-37.13 therefore rests upon the Commonwealth of Virginia and not Appellant, whose First Amendment liberties are affected, *Elrod* v. *Burns,* 427 U.S. 347, 362 (1976) (plurality opinion), and the standard of review to be applied by this Court to § 2.1-37.13 is one of "exacting scrutiny". *Buckley* v. *Valeo,* 424 U. S. 1, 64 (1976).

Beyond that, in assessing whether the state interest asserted herein is sufficiently compelling to justify the substantial infringement of Appellant's fundamental liberties, caused by the application below of § 2.1-37.13,

it is important to consider that "judges are supposed to be men [and women] of fortitude, able to thrive in a hardy climate". *Craig* v. *Harney,* 331 U.S. 367, 376 (1947).

> Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. . . . Criticism of [judges'] official conduct does not lose its constitutional protection merely because it . . . diminishes their official reputation. *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1968).

ANPA does not wish to burden this Court with a recitation of the very practical and substantial interests to be served by upholding the right of the press, and of the citizens of Virginia, to comment on preliminary proceedings before the Judicial Inquiry and Review Commission. Both from the standpoint of avoiding the mistrust and suspicion bred by secret "judicial" or administrative proceedings, *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 587 (1976), *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 269 (1964), and in serving as an "antidote to any abuses of power by [the Commission]", *Mills* v. *Alabama, supra,* at 219, publication of the sort criminalized under § 2.1-37.13 clearly serves a function which was sought to be protected under the First Amendment.

To uphold Appellant's conviction below would only serve to expand legislative control over press freedom. By prohibiting publication of "all testimony and other evidence" of judicial impropriety received by the Commission until such time as the Commission feels it appropriate to file a "complaint" with the Virginia Supreme Court, § 2.1-37.13

> fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptable or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. *Miami Herald Publ. Co.* v. *Tornillo,* 418 U.S. 241 (1974).

The mere fact that a particular state judge is the subject of an investigation and hearing by the Judicial Inquiry and Review Commission is, regardless of the merit of the underlying charges, "an event of legitimate concern to the public and [it] consequently falls within the responsibility of the press to report the operations of government." *Cox Broadcasting Corp.* v. *Cohn, supra,* at 492 (1975).

II. UNDER THE DECISIONAL AUTHORITIES OF THIS COURT, VA. CODE § 2.1-37.13 IMPOSES AN ILLEGAL PRIOR RESTRAINT ON PUBLICATION VIOLATIVE OF THE FIRST AMENDMENT

Your *amicus* respectfully submits that the Supreme Court of Virginia erred in concluding that Va. Code § 2.1-37.13 does not impose a prior restraint upon publication. That court argued that, since the statute provides for the imposition of criminal sanctions *after* information has been divulged, the proscription fits within the "subsequent punishment" category of cases. This argument ignores the effect of statutes such as

Va. Code § 2.1-37.13 and the theory underlying the doctrine of prior restraint. Review and analysis of the cases decided by this Court demonstrates that the statute at issue, both on its face and in effect, operates as a prior restraint upon publication.

The Supreme Court of Virginia stated: "Generally, prior restraints take the form of injunctions, requirements for licenses or permits, or censorship or previous review." Appellant's Jurisdictional Statement, Appendix A at 7a. This is true when one pays due heed to the qualifying term "generally." What the Supreme Court of Virginia failed to recognize was that the statute at issue falls into a category of prior restraints which are unique in their form and have never been clearly defined by this Court. *C.f.*, Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Prob. 648, 649 (1955).

This Court first invoked and applied the doctrine of prior restraint in *Near* v. *Minnesota*, 283 U.S. 697 (1931). There, the so-called "Minnesota Gag Law" provided that any person "engaged in the business" of regularly publishing or circulating an "obscene, lewd and lascivious" or a "malicious, scandalous and defamatory" newspaper or periodical "is guilty of a nuisance." Additionally, the state was enabled to initiate suit to enjoin perpetually any person committing such a nuisance from further committing it. Pursuant to the statute, suit was initiated against the *Saturday Press* after it had published nine issues. The state court found the publication to be a "nuisance" and perpetually enjoined the defendants from issuing "any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law."

This Court held that the statutory scheme constituted a prior restraint and was an abridgement of freedom of the press, stating that the operation of the statute amounted to "an effective censorship . . ." 283 U.S. at 712. Chief Justice Hughes reviewed the historical background of the First Amendment, stressing the intention of the framers to ban the English system of licensing the press. After noting that the prohibition against prior restraint did not apply in "exceptional cases"—for example, prior restraints on incitements to violence, obscenity, and certain types of obstruction to the conduct of war—the Chief Justice framed the doctrine as follows:

> The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and, taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. 283 U.S. at 716.

Finally, the Chief Justice noted that the doctrine protected the publication of material which might be the subject of subsequent punishment under criminal libel or other laws:

> The fact that for approximately one hundred years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.
> 283 U.S. at 718.

Justice Butler, speaking for the four dissenters, argued that the Minnesota statute did not operate as a *previous* restraint on publication since it only operated to prevent *further* publication. Technically, Justice Butler was correct. The Minnesota statute required no original approval of a publication (*i.e.* licensing), and the injunction did not bar *all* publication. The defendants were only restrained from publishing "malicious, scandalous and defamatory" newspapers; moreover, the punishment for violating the injunction was by contempt and would only be ordered if and when subsequent offenses were committed.

> Theoretically, therefore, the statute could hardly be said to set up prior restraint. On paper, it was a system for subsequent punishment by contempt procedure.
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> *But in practice, the system was bound to operate as a serious prior restraint.* Punishment could be summarily dispensed by a single official, without jury trial or the other protections of criminal proceedure, for infraction of a loose and illusive mandate. Under such circumstances, any publisher seeking to avoid prison would, in sheer self-protection, have to clear in advance any doubtful matter with the official wielding such direct, immediate, and unimpeded power to sentence. The judge would, in effect, become a censor.
>
> *Thus, the Court made clear that it was not interpreting the concept of prior restraint on a narrow legalistic or historical basis. It was, as it said, testing the statute by its "operation and effect."*
>
> Emerson, *supra* at 654-55. (emphasis supplied).

Since *Near*, this Court has applied the doctrine of prior restraint on numerous occasions. Confusion has

arisen, however, as to when the doctrine is applicable because only in certain categories of cases has the Court consistently stated, in explicit language, that the basis for decision was the doctrine of prior restraint. Beginning with *Lovell* v. *Griffin*, 303 U.S. 444 (1938), the Court routinely has analyzed municipal licensing ordinances, which require prior approval of the distribution of circulars or literature or the right to assemble, by analyzing the ordinances with reference to whether, on their face or in operation and effect, they imposed a prior restraint on expression. See, *e.g.*, *Kunz* v. *New York*, 340 U.S. 290 (1951) (prosecution for meeting without discretionary permit invalid); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (ordinance requiring discretionary permit for religious or charitable solicitation invalid). Similarly, the Court has expressly invoked the doctrine where communication is sought to be prohibited through resort to injunctions or other judicial processes. See, *e.g.*, *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, (1976) (court order barring press comment on pending criminal proceedings held invalid); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (injunction barring publication of classified government documents denied). In cases involving restrictions on the distribution and/or display of possibly obscene materials, the Court has invoked the doctrine to invalidate statutes which prevent publication, display or circulation, at least where the statutes contain no adequate procedural safeguards. See, *e.g.*, *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (statute requiring approval prior to showing motion picture invalidated); *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963) (procedures of state commission amounting to system of informal censorship held violative of First Amendment).

Thus, in the above categories of cases, the Court has consistently and explicitly utilized the doctrine of prior restraint in determining the constitutionality of the statutes, rules or regulations at issue. But the above categories do not exhaust the kinds of cases to which the doctrine is applicable. To understand the full application of this doctrine, it is necessary to constantly bear in mind the test enunciated by Judge Cooley, so frequently cited by this Court:

> The mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications, . . . Their purpose [of the free-speech clauses] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. . . . *The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.* (emphasis supplied) Cooley, *Constitutional Limitations* (7th ed.) pp. 603-04.

A few years after *Near* v. *Minnesota, supra,* this Court decided *Grosjean* v. *American Press Co.,* 297

U.S. 233 (1936), and held that a license tax for the privilege of engaging in business, imposed on advertising revenues, was an unconstitutional abridgement of freedom of the press. The Court reviewed the history of press censorship in England prior to the adoption of the Bill of Rights in this country and noted that the tax at issue was little different from the "taxes on knowledge" which England had used to suppress the dissemination of information. The Court concluded that the framers of the First Amendment, being aware of the English experience and the resultant theory of Blackstone that "freedom of the press" meant only immunity from previous censorship, did not intend such a restrictive coverage to be applied to freedom of the press. Although the Court did not specifically refer to the Louisiana tax as a "prior restraint," it is instructive to note that heavy reliance was placed on *Near* v. *Minnesota,* the Court observing:

> The conclusion there [in *Near*] stated is that the object of the constitutional provisions was to prevent previous restraints on publication; *and the court was careful not to limit the protection of the right to any particular way of abridging it.* 297 U.S. at 249 (emphasis supplied).

In light of the Court's conclusion that the Louisiana tax was a "deliberate and calculated device . . . to limit the circulation of information . . .," and its reliance on *Near* and the language of Judge Cooley, there can be little doubt but that *Grosjean* broadened the doctrine of prior restraint and made it applicable to any laws or systems of regulation which are intended, or in effect, suppress the dissemination of information.

The theory that a statutory or regulatory scheme which has the effect of suppressing the circulation or

publication of information constitutes a prior restraint was reiterated in *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963). There, the Rhode Island legislature created a commission with responsibility to educate the public as to publications "tending to the corruption of youth" and to investigate and recommend the prosecution of violations of the laws applicable thereto. The commission engaged in the routine practice of notifying distributors of publications, placed on the lists of publications, which the commission had found to be objectionable; such lists were also provided to law enforcement agencies, and the distributors were made aware of this fact. The trial court found, as facts, that such notices had the effect of intimidating the distributors, of causing the distributors to withdraw the listed publications from sale, and of suppressing the sale and distribution of such publications. 372 U.S. at 63-64. This Court held that the actions of the commission constituted "a scheme of state censorship effectuated by extralegal sanctions" and imposed an illegal prior restraint on expression in violation of the First Amendment.

The teaching of *Grosjean* and *Bantam Books* is that the doctrine of prior restraint is applicable whenever a legislative act or regulatory scheme, on its face or in its operation and effect, prohibits the dissemination of information. It matters not whether this prohibition takes the form of a denial of a license to publish, an injunction against publication, or a statutory ban. If the operation and effect of the legal provisions or system at issue results in the prevention of expression, then the doctrine applies. For,

> [t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.[1]

This same "vice" was present in the proceedings below wherein petitioner suffered criminal conviction in

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[1] *Pittsburgh Press Co.* v. *The Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973). In Pittsburgh Press, a commercial speech case, the majority held that a newspaper could be prevented from publishing "help-wanted" advertisements in sex-designated columns. In commenting on your *amicus'* suggestion that the order prohibiting such advertising imposed a prior restraint on expression, the majority held that the order did not endanger "protected" speech since the speech at issue was held by the Court to be illegal. It is arguable that the order in *Pittsburgh Press* merely regulated the manner in which certain expression could be presented and, therefore, did not constitute a prior restraint.

Subsequent to *Pittsburgh Press*, this Court has considered several commercial speech cases. *Bates* v. *State Bar of Arizona*, —— U.S. ——, 45 U.S.L.W. 4895 (1977); *Carey* v. *Population Services International*, —— U.S. ——, 45 U.S.L.W. 4601 (1977); *Linmark Associates, Inc* v. *Township of Willingboro*, —— U.S. ——, 45 U.S.L.W. 4441 (1977); *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). In those cases challenges to laws and regulations which absolutely prohibited certain kinds of expression were upheld on the basis that the prohibitions were violative of the First Amendment. Although the Court did not refer to these prohibitions as prior restraints, it well could have. Indeed, the Court's approach to these cases is similar to that utilized in cases in which the Court has explicitly recognized the doctrine of prior restraint to be applicable. In *Bates*, for example, the Court seemingly assumed that the disciplinary rule, prohibiting advertising by attorneys, came before the Court "bearing a heavy presumption of invalidity," *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971), when it recognized that "the disciplinary rule serves to inhibit the free flow of commercial information," and stated: "The choice between the dangers of suppressing information and the dangers arising from its free flow was seen as precisely the choice 'that the First Amendment makes for us.'" 45 U.S.L.W. at 4899. [citation omitted].

the absence of any evidence showing a clear and present danger to a legitimate state interest.

Bantam Books illustrates the "excessive caution" and suppression of constitutionally protected speech which flow from indirect systems of prior restraint. The same result also may be achieved by direct means, such as Va. Code § 2.1-37.13. Such statutes may appear to fall into the "subsequent punishment" category. Nevertheless this Court has previously analyzed such statutes in a manner consistent with those cases wherein the Court expressly acknowledged that the doctrine of prior restraint was applicable.

Mills v. *Alabama,* 384 U.S. 214 (1966), presented the question of whether a state could make it a crime for a newspaper editor to publish an editorial on election day urging the people to vote in a certain way. Mills had been convicted of publishing such an editorial in violation of the Alabama Corrupt Practices Act. This Court found the criminal law to be an "obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press." 384 U.S. at 219. After noting that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," the Court addressed the censorious effect of the law in language which clearly has its genesis in the doctrine of prior restraint:

> Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. 384 U.S. at 219.

It is also significant that the law in question had demonstrably affected the free flow of information; subsequent to the prosecution of Mills, there had been no editorial comment on election day. 283 U.S. at 221 (dissenting opinion of Douglas, J.).

Miami Herald Publishing Co. v. *Tornillo,* 418 U.S. 241 (1974), presented the opposite situation to that in *Mills.* In *Tornillo,* a Florida statute required a newspaper to provide to political candidates, whom the newspaper had criticized, equal space to reply; failure to comply with the statute was punishable as a crime. On appeal, this Court held the Florida statute to be unconstitutional, stating:

> The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. *Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. Grosjean* v. *American Press Co.* 297 U.S. 233, 244-245, 80 L.Ed. 660, 56 S Ct 444 (1936). 418 U.S. at 256 (emphasis supplied).

That the Court considered the Florida statute to be no different from a prior restraint is evident especially in light of the Court's expressed concern that the Florida statute would suppress political debate.

Grosjean, Bantam Books, Mills and *Tornillo,* when taken together, demonstrate this Court's commitment to the proposition that laws or regulatory systems which, in operation and effect, suppress freedom of expression fall within the broad doctrine of prior re-

straint first enunciated in *Near* v. *Minnesota,* 283 U.S. 697 (1931). The instant case is no different. Indeed, it is almost identical to *Mills* v. *Alabama*—both cases involve statutes which bar the publication of designated information, and in both cases criminal penalties may be imposed solely on the basis of the content of the publication. No opportunity is afforded for a determination of whether the communication is protected under the First Amendment prior to the suppression of the communication. *C.f., Bantam Books, supra* at 70-71; *Pittsburgh Press, supra* at 390.

Your *amicus* respectfully submits that Va. Code § 2.1-37.13, in its operation and effect, imposes a prior restraint upon the publication of comment upon public officials and public issues—expression which is protected speech—and that this Court should address the constitutionality of the Virginia statute with reference to the doctrine of prior restraint. As a prior restraint, the statute comes before this Court with a heavy presumption of invalidity, *New York Times Co.* v. *United States,* 403 U.S. 713, 714 (1971), and there is no constitutional basis, in the present case, upon which that presumption can be overcome.

III. THE PRESS MAY NOT BE PROHIBITED FROM PUBLISHING COMMENTS CONCERNING THE PRELIMINARY PROCEEDINGS OF THE VIRGINIA JUDICIAL INQUIRY AND REVIEW COMMISSION, REGARDLESS OF HOW SUCH INFORMATION IS OBTAINED

Your *amicus* agrees that in the presence of a compelling interest, it may be permissible for the state to attempt to preserve the confidentiality of certain information by limiting the access of the press to the

sources of such information.[2] *Pell* v. *Procunier,* 417 U.S. 817, 834 (1974). ANPA strongly asserts, however, that it is unconstitutional to prohibit, on pain of criminal sanctions, the publication of information concerning the conduct of public officials once such information has been disclosed to the press.

As noted above, publication of information concerning the conduct of judges is speech protected under the First Amendment and is clearly distinguishable from the type of publication which this court held in *New York Times Co.* v. *United States,* 403 U.S. 713 (1971) could constitutionally be prohibited by statute. Your *amicus* does not dispute that where the publication of information poses a serious and imminent threat to national security, the publication of such information may be constitutionally proscribed. No such compelling state interest exists in the case before the court. The primary interest which Virginia Code § 2.1-37.13 seeks to protect, is the reputational interest of public officials—an interest which does not weigh heavily when balanced against the public's First Amendment right to information concerning the conduct of government. *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974); *Time Inc.* v. *Firestone,* —— U.S. ——, 96 S.Ct. 958 (1976).

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[2] Your *amicus* has consistently taken the position that the public has a right of access to the source of information concerning the criminal justice system. The press' right of access to such sources proceeds from the right of the public since it is the function of a free press to gather and disseminate information of importance to the public because no individual can possibly learn all that transpires in a complex modern society. It is ANPA's position that as a matter of policy, and as a matter of law, those involved in the judicial system, particularly law enforcement officers, should not be prohibited from releasing such information.

Recent decisions of this Court establish the principle that the press may not be prohibited from publishing comments concerning the operation of the judicial system, regardless of how such information is obtained. In *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976), this Court, in a unanimous decision, struck down a judicially imposed gag order which prohibited the press from commenting on a criminal trial. Your *amicus* asserts that the legislatively imposed, continuing gag order embodied in Va. Code § 2.1-37.13 is a similar prior restraint on publication. Justice Brennan's concurring opinion in *Nebraska Press Association* explicitly states that the publication of information concerning the "operation of the criminal justice system" cannot be constitutionally prohibited under any circumstances.

> Settled case law concerning the impropriety and constitutional invalidity of prior restraints on the press compels the conclusion that *there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained.* 427 U.S. at 570 (Brennan, J. concurring) (emphasis supplied).

Justice Brennan points out that though the press cannot be enjoined from reporting certain information the press is not necessarily immunized from civil liability for libel or invasion of privacy or from criminal liability for transgressions of general criminal laws *committed in the course of obtaining that information. Id.,* n.15.

The case before this Court does not involve punishment for obtaining information by illegal means. This

case presents the question of the legality of a statutory gag order which prohibits the publication of information regardless of how such information was obtained. Justice Brennan's opinion indicates that the First Amendment affords unconditional protection against such a statutory prohibition.

A second recent decision of this Court supports the the proposition that the press may not be prohibited from publishing information concerning the operation of the criminal justice system though the press may have no constitutional right of access to the information in the first instance. In *Pell* v. *Procunier,* 417 U.S. 817 (1974), this Court upheld prison regulations which restricted access of the press to prisoners for the purpose of conducting interviews. While noting that the press is generally excluded from grand jury proceedings, from the conferences of the United States Supreme Court, and from the meetings of certain official bodies meeting in executive session, Mr. Justice Stewart's opinion stated:

> [A] journalist is free to seek out sources of information not available to the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, *cf. Branzburg* v. *Hayes* [408 U.S. 665 (1972)], and that government cannot restrain the publication of news emanating from such sources. *cf. New York Times Co.* v. *United States, supra.*

The language cited above gives recognition to the principle that although there may be no "constitutional right of access to particular government information, as to require openness from the bureaucracy . . . the press is free to do battle against secrecy and deception in government" and that "the press may publish what

it knows, and may seek to learn what it can." Stewart, "Or of the Press," Address before the Yale Law School, Nov. 2, 1974, 26 Hastings L.Rev. 631 (1976).

There can be little doubt in light of recent American political history that disclosure of confidential information is critical in the explanation of public policy by government officials, and to the flow of information to the public from individuals within government. Confidential communications have proven indispensable in revealing criminal activity and mismanagement within government. In other circumstances, such communications may be viewed as appeals to public opinion where a matter of public policy is being decided in secret. Confidential communications open decisions to public scrutiny, activating the interaction among pluralistic forces which is the essence of a democratic society. Legislative bodies, government agencies, political parties and interest groups are given the opportunity to mobilize in response. Thus, confidential communications to reporters may be viewed as playing a vital role in the functioning of our democratic system. The disclosure of confidential information by government officials rarely occurs in totalitarian countries where appeals to public opinion are of little consequence.

CONCLUSION

There is no compelling state interest in prohibiting publication of information concerning the proceedings of the Virginia Judicial Inquiry and Review Commission. On the contrary, the public has a First Amendment right to information concerning the conduct of judges, as well as any other public servant. The statutory prohibition on publication manifested in Va. Code § 2.1-37.13 is therefore repugnant to the First Amendment to the Constitution of the United States.

Accordingly, ANPA respectfully represents to the Court in light of all the foregoing, that it should overturn Appellant's conviction in the Circuit Court of the City of Norfolk and reverse the decision of the Supreme Court of Virginia below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,
Appellant

v.

COMMONWEALTH OF VIRGINIA,
Appellee

On Appeal from the Supreme Court of Virginia

Brief of THE NATIONAL NEWSPAPER ASSOCIATION, THE ARIZONA NEWSPAPERS ASSOCIATION, THE LOUISIANA PRESS ASSOCIATION, THE MARYLAND-DELAWARE-D.C. PRESS ASSOCIATION, THE MICHIGAN PRESS ASSOCIATION, THE NEBRASKA PRESS ASSOCIATION, THE OREGON NEWSPAPER PUBLISHERS ASSOCIATION, THE PENNSYLVANIA NEWSPAPER PUBLISHERS ASSOCIATION, THE TEXAS DAILY NEWSPAPER ASSOCIATION, THE TEXAS PRESS ASSOCIATION, THE VIRGINIA PRESS ASSOCIATION as *Amici Curiae* in Support of Appellant

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The National Newspaper Association — joined by the Arizona Newspapers Association, the Louisiana Press Association, the Maryland-Delaware-D.C. Press Association, the Michigan Press Association, the Nebraska Press Association, the Oregon Newspaper Publishers Association, the Pennsylvania Newspaper Publishers Association, the Texas Daily Newspaper Association, the Texas Press Association and the Virginia Press Association — respectfully submit this brief as *amici curiae* in support

of Appellant's appeal from the decision of the Supreme Court of Virginia (entered March 4, 1977) which held that Virginia Code §2.1-37.13, as construed by that court, does not violate the First and Fourteenth Amendments to the Constitution of the United States. *Landmark Communications, Inc.* v. *Commonwealth of Virginia*, 217 Va. 699, 233 S.E.2d 120, 2 Med.L.Rptr. 1449 (1977).

Filed with this brief, pursuant to Rule 42(2) of this Court, are the written consents of the parties for the filing of the instant brief.

STATEMENT OF THE CASE

Amici curiae adopt the statement of the case set forth in Appellant's Jurisdictional Statement, believing it to be an accurate statement of the facts.

INTEREST OF THE AMICI CURIAE

The National Newspaper Association (NNA) is a 93 year-old national association of more than 6,000 newspapers (950 dailies and 5,300 weeklies). Appellant's newspaper, *The Virginian-Pilot*, is a member of NNA, as are the *Richmond News Leader* and the *Richmond Times-Dispatch*. In separate proceedings not now before this Court, the Commonwealth of Virginia has charged the publisher of the Richmond newspapers with violating Virginia Code §2.1-37.13. NNA members include a total of 80 weekly and 24 daily newspapers in Virginia.

The Arizona Newspapers Association, the Louisiana Press Association, the Maryland-Delaware-D.C. Press Association, the Michigan Press Association, the Nebraska Press Association, the Oregon Newspaper Publishers Association, the Texas Daily Newspaper Association, the Texas Press Association, and the Virginia Press Association represent members who publish newspapers in their respective states.

NNA represents its members in national matters affecting business and professional aspects of newspaper publishing. The members range from small weekly newspapers to large metropolitan dailies, covering a wide philosophical and political spectrum. The great bulk of the membership is comprised of rural and suburban weeklies and small city dailies. While the membership often reflects the diversity of views which the First Amendment makes possible, there are some matters on which there is near unanimity of outlook. One of those issues is the question now before this Court.

Three and one-half years ago, NNA last felt compelled to bring its separate views to the attention of this Court. Then, in describing the Association's interest, NNA said that:

> If the decision is allowed to stand, newspaper freedom and, in turn, the freedom of the public to be informed free from government intervention and/or suppression, will have been dealt a serious and crippling blow. Brief of *Amicus curiae*, The National Newspaper Association at 3, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

NNA reiterates that same concern in the context of the controversy now before this Court.

ARGUMENT

THE FIRST AND FOURTEENTH AMENDMENTS DO NOT PERMIT A STATE TO IMPOSE CRIMINAL SANCTIONS AGAINST A NEWSPAPER FOR PUBLICATION OF INFORMATION INVOLVING THE PUBLIC DUTIES OF A PUBLIC OFFICIAL.

Article VI, §10 of the 1971 Constitution of the Commonwealth of Virginia mandates creation of a Judicial Inquiry and Review Commission for the purpose, according to the Supreme Court of Virginia, "of investigating charges concerning disabled and unfit judges." 217 Va. at 700, 223 S.E.2d at 121, 2 Med.L. Rptr. at 1449. Virginia Code §2.1-37.13 provides that the Commission's business "shall be confidential and shall not be divulged by any person to anyone . . ." and makes violation of this provision a misdemeanor. The Supreme Court of Virginia has upheld Appellant's criminal conviction and $500 fine for publishing and thereby "unlawfully divulging" the fact that a state judge was under investigation by the Commission. 217 Va. at 701, 223 S.E.2d at 122, 2 Med.L.Rptr. at 1450. It is the view of the Supreme Court of Virginia that absent a requirement of confidentiality, enforced by statutory criminal sanction against publication, Virginia's Commission "could not function properly or discharge effectively its intended purpose." 217 Va. at 712, 233 S.E.2d at 129, 2 Med.L.Rptr. at 1455. The Supreme Court of Virginia rejected all federal constitutional claims.

Amici contend that the Supreme Court of Virginia's decision is contrary to the First and Fourteenth Amendments for the reason that no interest of any State justifies criminal statutory punishment for newspaper publication of information concerning the conduct of public officials.

In its major decisions involving freedom of the press, this Court has viewed the First Amendment as a necessity for

the "maintenance of our political system and an open society." *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967). Consistent with that view, this Court has repeatedly held that the First Amendment protects the press from government interference in its effort to gather and disseminate news and opinion on the conduct of government. *Oklahoma Publishing Co.* v. *District Court*, ____ U.S. ____, 97 S.Ct. 430 (1976); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931). Our constitutional system embodies a

> profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. *New York Times Co.* v. *Sullivan*, 376 U.S. at 270 (1964).

It is the American press which bears the major responsibility for insuring an informed and intelligent electorate.

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government . . . *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491-92 (1975).

Newspapers, particularly those which keep their eyes on the governmental bodies of small communities, traditionally focus public attention on matters of community impor-

tance. Statutory penalties such as the one before this Court have as their sole purpose the prevention of publication of certain news and information on the conduct of public officials. Such sanctions will seriously undermine the central role of the press in the proper functioning of a democratic society.

There are few institutions of greater importance to communities than their local courts. Coverage of these courts and their officials is a major press responsibility.

> With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. *Id.* at 492.

Over 35 years ago, in *Bridges* v. *California*, 314 U.S. 252 (1941), this Court considered state court contempt convictions for publication of critical editorial views concerning pending cases. The state sought to justify the convictions as necessary to prevent "disrespect for the judiciary; and disorderly and unfair administration of justice." *Id.* at 270. This was the "substantive evil" the state claimed a right to prevent. Rejecting the state's rationale that punishment was necessary to protect the proper functioning of the judiciary — a rationale nearly identical to that advanced by Virginia in the instant case — the Court noted its disapproval of a "moratoria on public discussion" while cases were pending. *Id.* at 269. As for the contention that choking expression was a permissible state action:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public

> institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect. 314 U.S. at 270-71 (footnote omitted).

Severe, inaccurate criticism and unfair reporting have likewise not persuaded this Court to let stand state contempt convictions imposed for publication of information concerning the judiciary.

> This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may not hold in contempt one "who ventures to publish anything that tends to make him unpopular or to belittle him . . . ." *Craig v. Harney*, 331 U.S. 367, 376 (1947), *quoting Craig v. Hecht*, 263 U.S. 255, 281 (1923) (Holmes, J., dissenting).

In *Pennekamp v. Florida*, 328 U.S. 331 (1946), the state of Florida argued that its power to control the administration of justice justified judgments of guilt in contempt for publication of editorials "unlawfully critical" of the criminal justice system. This Court agreed that portions of the editorials "did not state objectively the attitude of the judges," and that there were factual errors. *Id.* at 345. The court also accepted the state court's finding that "the motive behind the publication was to abase and destroy the efficiency of the courts . . . ." *Id.* Yet, this Court was not convinced that publication of the editorials justified state sanctions against their publishers. Criticisms of a judge's actions, said this Court, "could not affect his ability to decide the issues." *Id.* at 348. A similar result was reached in *Wood v. Georgia*, 370 U.S. 375 (1962), where criticism of judicial action was the basis for a contempt conviction. The conviction had been imposed on a finding that language used in commenting on a judge's grand jury charge "was

designed and calculated to be contemptuous of the court, to ridicule the investigation ordered by the charge, and to 'hamper, hinder, interfere with and obstruct' the grand jury investigation." *Id.* at 380-81. This Court reversed the conviction.

In none of the above-cited cases was the state's interest in protecting the operation of its judicial system found sufficient to justify punishment for publication of views on public officials and government functions. *Amici* argue that *Bridges, Pennekamp, Craig* and *Wood* stand for the proposition that there is no state interest which presents sufficient justification to punish for publication of this information alone.

There is no basis to distinguish the above cases on the ground that they involved judicial findings only and not the findings of a state legislative body. For "even the expression of 'legislative preferences or beliefs,' cannot transform minor matters into substantive evils of sufficient weight to warrant the curtailment of liberty of expression." *Bridges v. California*, 314 U.S. at 263, *quoting Schneider v. State*, 308 U.S. 147, 161 (1939). A claimed state interest does not "allow a presumption of validity of the exercise of state power . . ." to interfere with this Court's examination of the First Amendment claim. *Wood v. Georgia*, 370 U.S. at 386. The state may not employ either its judicial *or* its legislative power to sanction those who would publish news about public officials.

To the extent that a state may protect an individual public official's personal interests, *amici* contend that the outer limits of state power are confined to existing civil remedies of defamation and invasion of privacy. "For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants." *Pennekamp v. Florida*, 328 U.S. at 348-49. In *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) (footnote omitted), this Court noted that "the interest in private

reputation [of public officials] is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." Indeed, if the state is permitted to impose, through its criminal law, a different standard to evaluate speech concerning public officials than that used in civil proceedings, the dictates of *New York Times v. Sullivan*, and its progeny, could be effectively avoided. This is the basis for the Court's rationale in *Garrison v. Louisiana*. Thirteen years of this Court's efforts to insure federal protection for comment on public officials could be lost if the Virginia scheme is allowed to stand. *New York Times v. Sullivan* (city commissioner of public affairs); *Garrison v. Louisiana* (judges); *Henry v. Collins*, 380 U.S. 356 (1965) (county attorney and chief of police); *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (former supervisor of county-owned ski recreation area); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967) (county clerk); *St. Amant v. Thompson*, 390 U.S. 727 (1968) (deputy sheriff); *Ocala Star Banner Co. v. Damron*, 401 U.S. 295 (1971) (mayor); *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (deputy chief of detectives).

For example, it surely matters not, in the view of *amici*, whether the news report in issue in this case was accurate. Under *New York Times v. Sullivan*, a libel action may not be maintained on a showing of falsity or defamatory content alone: "If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination is no less inadequate." *New York Times v. Sullivan*, 376 U.S. at 273. Yet, under Virginia's scheme there is no room for this basic constitutional principle. Virginia does not permit constitutional defense and this does ultimate violence to the rationale of *New York Times v. Sullivan*, that state laws may not be employed to inhibit debate and comment on public officials.

But even if Virginia were to incorporate the *New York Times v. Sullivan* rule into the criminal statute, the dif-

ficulty would not end. *Amici* believe that the fundamental vice of the Virginia scheme is its use of the criminal sanction against the news media to enforce confidentiality. It is obvious that the prospect of criminal punishment for publication of information about government operations and officials is far more threatening than the possibility of a civil suit. The criminal process arrays the full panoply of state police power against individual newspapers. Of course, for actual defamation, the individual newspaper will still be subject to civil action and the prospect of large money judgments. Notwithstanding the possibility of substantial monetary civil judgements, *amici* believe that the prospect of civil actions does measurably less violence to First Amendment freedom than a criminal action. The prospect of such criminal action will inevitably result in less relevant information available to the public. Editors will not be able to execute their editorial responsibilities for despite the public importance of particular news — allegations of fraud, deceit, misfeasance, bribery — Virginia's statute leaves the editor with no defense. The press will not be able to fulfill its role. Meaningful debate and truly informed judgments will not be possible. Most importantly, the criminal penalty will have the result of producing "restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. . . ." *Bridges v. California*, 314 U.S. at 268. And, the criminal penalty will arrive at a time when its effect will serve no useful purpose — the information sought to be suppressed will have already been disseminated.

In addition to civil libel remedies, there is another meaningful remedy available for the correction of false or misleading allegations concerning state agencies and officials.

> Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the

> expression. Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment of the rights of free speech. *Wood v. Georgia*, 370 U.S. at 389.

Presentation of the opposing view is the only refuge from the storm of criticism and the glare of the public spotlight. "[T]he Constitution requires that false ideas be corrected only by the competitive impact of other ideas. . . ." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 499 n.3 (Powell, J., concurring). "Those who won our independence had confidence in the power of free and fearless reasoning to discover and spread political . . . truth." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

The following hypothetical facts illustrate the serious impact of the Virginia statute: A community newspaper receives from a very reliable citizen information about proceedings before a state Public Official Inquiry and Review Commission, a body operating in a manner similar to the Virginia Judicial Inquiry and Review Commission, but hearing complaints on non-judicial public officials as well.[1] The information suggests that members of the Commission have committed criminal acts in the conduct of their own duties and in the course of Commission proceedings. Furthermore, there is some indication that the public official then under investigation has given bribes to Commission members. Through the use of other sources the newspaper believes that it has substantial independent evidence to support this version of events. Under Virginia's scheme, the newspaper must not publish its story on pain of criminal conviction and fine.

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[1]Justice Poff, dissenting from the opinion of the Supreme Court of Virginia in this case, suggested that the decision "could justify a similar restriction with reference to the proceedings of a commission reviewing charges against an executive officer or a legislator." 217 Va. at 713, 233 S.E.2d at 129, 2 Med.L.Rptr. at 1456.

The hypothetical above posits a watchdog agency which has failed to perform its mandate. It is in exactly such situations where newspapers must remain free to scrutinize and disseminate information on public officials using all the facts they are able to gather. Virginia's statute in effect countenances irresponsible journalism by commanding self-censorship of material which may be of extreme public importance. The tenets of modern journalism are to the contrary:

> The primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time. . . . The American press was made free not just to inform or just to serve as a forum for debate but also to bring an independent scrutiny to bear on the forces of power in the society, including the conduct of official power at all levels of government. *A Statement of Principles*, American Society of Newspaper Editors, "The Bulletin," Nov./Dec. 1975 at 23.

Amici fear other potential ramifications if this Court affirms the decision in issue. One area is of particular concern. In recent years, states have passed legislation delineating those government records and proceedings which are available and open to the public and those which are not. Some government information is labeled confidential and such characterization is certainly a matter of state law. Such confidentiality provisions may very well encompass employment and other personnel records and material concerning public officials. However, no confidentiality requirement — when the information at issue concerns the public duties of public officials — should ever be enforceable through criminal sanctions against the news media. An affirmance of the Supreme Court of Virginia's decision would empower states to do just that. There is the

spectre of new state legislation and new enforcement policies for existing legislation designed to prevent the news media from disseminating news it obtains about the public duties of public officials.[2]

Recent stories appearing in newspapers around the country suggest subject areas — all involving public officials and government operations — which might warrant imposition of criminal sanctions under legislative schemes similar to that held constitutional by the Supreme Court of Virginia.

In Manville, New Jersey, the weekly *Manville News* (circ. 1,783) published a story about a case in which a local clerk-administrator and a councilman face charges for conspiracy and misconduct in office — involving a kickback scheme with vendors doing business with the borough. "Indicted Officials Split Hearings" July 7, 1977 at 1.

The weekly *Fairbury Blade* (circ. 3,011) of Fairbury, Illinois, carried a story about a sheriff's deputy who had received a 30-day suspension for allegedly selling a weapon from the jail evidence room; the public did not know of the charge or the reason for the suspension until the story appeared. "Sheriff Tightens Security . . . Suspends Deputy for Selling Evidence" July 7, 1977 at 1.

In Waupun, Wisconsin, the weekly *Waupun Leader News* (circ. 3,170) reported that an aide to a state senator would resign, following a press investigation into charges of personal telephone calls charged to the state by state legislators. "McCallum's Aide Resigns Position" July 13, 1977 at 1.

The weekly *Milford Times* (circ. 3,702) of Milford, Michigan ran a story about a member of the village council

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[2] A recent federal report, arising in another context, rejects criminal sanctions against the news media as a means of enforcing legitimate government interests in confidentiality. Personal Privacy in an Information Age, The Report of the Privacy Protection Study Commission, 21-26, U.S. Gov't. Printing Office (1977).

and director of a "Children's Village" charged with misappropriating about $11,000 in public funds. "Words Cannot Express What I Feel" July 6, 1977 at 1.

The *Trumbull Times* (circ. 5,831), a weekly in Trumbull, Connecticut, published an article about an investigation into alleged nepotism in the hiring of summer employees by the local government. "Favoritism in Summer Jobs? Examiner in Charge Says No" July 7, 1977 at 1.

The Citizen (circ. 6,287), a weekly in Denville, New Jersey, carried an article about charges lodged by a developer (but later dismissed in court) against a local mayor — claiming that the mayor had stopped a project for personal motivations and gain. The developer faces an indictment in a separate matter for bribery of local officials. "Russo Suit Dismissed; Eckhardt is Immune" July 13, 1977 at 1.

In Jessup, Georgia, the weekly *Press Sentinel* (circ. 7,000) carried a story about a controversy over grand jury presentments, with members of a grand jury claiming substantial alteration of their final reports. "Two Grand Jury Members Disagree with P-S Article" July 11, 1977 at 1.

In Bothell, Washington, *the Citizen* (circ. 7,500), a weekly, carried an article on the summary firing by Sewer District Commissioners of the district's manager, a law firm and an engineering firm. "Sewer District Axes Manager, Consultants" July 6, 1977 at 1.

The weekly Auburn, Washington *Globe News* (circ. 16,688) printed a story concerning an upcoming hearing for a city utility superintendent who faces charges of misconduct in office. "Pacific Official's Hearing July 22" July 6, 1977 at 1.

The daily *Farmington Evening Press* (circ. 3,150), Farmington, Missouri, published a story reporting on deliberations of the county Ambulance Board over selection of a manager — including charges of a threat to a hospital employee. "Board, Coplin Talks Stall Again" July 7, 1977 at 1.

The *Edmond Sun* (circ. 6,753), a daily in Edmond, Oklahoma, carried a story about a local fire department captain whom the fire chief had demoted for publicly blaming city officials for the fire destruction of an area home — alleging failure to permit a new fire station to open. "Suspended Fireman Vows Court Battle" July 10, 1977 at 1.

CONCLUSION

Amici assert that Virginia Code § 2.1-37.13, as interpreted by the Supreme Court of Virginia, violates the First and Fourteenth Amendments to the United States Constitution. Any legislative scheme which would impose criminal sanctions on the publication of information about the public duties of public officials is fundamentally at odds with our system of free expression. If newspapers effectively lose their right to question and criticize the judiciary and government generally — and report on charges against judges and other public officials — the public will bear the brunt of the loss; the harm to the principle of free debate in a democratic system would be incalculable. To affirm the Supreme Court of Virginia's decision would be to launch this Court on a perilous descent down a slippery slope past 13 years of deference to free debate about the public duties of public officials. This

Court should reverse the decision of the Supreme Court of Virginia.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC., *Appellant*,
v.
COMMONWEALTH OF VIRGINIA, *Appellee*.

On Appeal from the Supreme Court of Virginia

BRIEF OF THE WASHINGTON POST COMPANY, CBS INC., NATIONAL BROADCASTING COMPANY, INC., DOW JONES & COMPANY, INC., THE NEW YORK TIMES COMPANY, FIELD ENTERPRISES, INC., NEWSDAY, INC., THE GLOBE NEWSPAPER COMPANY, PHILADELPHIA NEWSPAPERS, INC., THE MIAMI HERALD PUBLISHING COMPANY, THE PULITZER PUBLISHING COMPANY, MINNEAPOLIS STAR AND TRIBUNE COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, THE COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, THE COPLEY PRESS, INC., TENNESSEAN NEWSPAPERS, INC., THE FREE LANCE-STAR PUBLISHING CO., AND THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, AMICI CURIAE, IN SUPPORT OF REVERSAL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC., *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, *Appellee*.

On Appeal from the Supreme Court of Virginia

BRIEF OF THE WASHINGTON POST COMPANY, CBS INC., NATIONAL BROADCASTING COMPANY, INC., DOW JONES & COMPANY, INC., THE NEW YORK TIMES COMPANY, FIELD ENTERPRISES, INC., NEWSDAY, INC., THE GLOBE NEWSPAPER COMPANY, PHILADELPHIA NEWSPAPERS, INC., THE MIAMI HERALD PUBLISHING COMPANY, THE PULITZER PUBLISHING COMPANY, MINNEAPOLIS STAR AND TRIBUNE COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, THE COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, THE COPLEY PRESS, INC., TENNESSEAN NEWSPAPERS, INC., THE FREE LANCE-STAR PUBLISHING CO., AND THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, AMICI CURIAE, IN SUPPORT OF REVERSAL

Fifteen newspaper publishers, two broadcast companies, and a professional association of newspaper editors submit this brief as *amici curiae* in support of

appellant's claim that the judgment of the Supreme Court of Virginia, entered on March 4, 1977, should be reversed. Both parties to this action have given their written consent to the filing of this brief pursuant to Rule 42(2) of the Rules of this Court. Copies of the letters of consent have been filed with the Clerk, and are appended to this brief.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia, dated March 4, 1977, is set forth in the Appendix to the Jurisdictional Statement (hereinafter "J.S. Appendix") at page 1a and is reported at 217 Va. 699. The order of the trial court dated January 15, 1976, finding Landmark Communications (hereinafter "Landmark") guilty as charged and imposing a fine of $500, is set forth in the J.S. Appendix at page 21a and is unreported.

JURISDICTION

The decision of the Supreme Court of Virginia affirming Landmark's criminal conviction and rejecting its constitutional arguments was issued on March 4, 1977. A Notice of Appeal was filed on April 15, 1977, and this Court noted probable jurisdiction on June 13, 1977.

Jurisdiction of this Court to review the decision of the Supreme Court of Virginia is conferred by 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Article VI, § 10 of the Constitution of Virginia provides, in part:

> "The General Assembly shall create a Judicial Inquiry and Review Commission consisting of members of the judiciary, the bar, and the public and vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge. The Commission shall be authorized to conduct hearings and to subpoena witnesses and documents. Proceedings before the Commission shall be confidential.
>
> "If the Commission finds the charges to be well-founded, it may file a formal complaint before the Supreme Court.
>
> "Upon the filing of a complaint, the Supreme Court shall conduct a hearing in open court and, upon a finding of disability which is or is likely to be permanent and which seriously interferes with the performance by the judge of his duties, shall retire the judge from office. A judge retired under this authority shall be considered for the purpose of retirement benefits to have retired voluntarily.

> "If the Supreme Court after hearing on the complaint finds that the judge has engaged in misconduct while in office, or that he has persistently failed to perform the duties of his office, or that he has engaged in conduct prejudicial to the proper administration of justice, it shall censure him or shall remove him from office."

Sections 2.1-37.1 through 2.1-37.18 of the Code of Virginia establish and provide the rules for the Virginia Judicial Inquiry and Review Commission.[1] Section 2.1-37.13 provides, in relevant part:

> "All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11 ["Order compelling witness to attend and testify"], 2.1-37.12 ["Depositions"]), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character . . .
>
> "All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal, shall be kept in the confidential files of the Commission.
>
> "Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."

The term "divulge" is not defined in the Virginia Code.

---

[1] The complete text of the Virginia statute relating to the Commission is set forth in J. S. Appendix at pp. 22a-30a.

Pursuant to Virginia Code § 18.2-11(a), a misdemeanor may be punished by imprisonment for up to 1 year and a fine of up to $1,000.

QUESTIONS PRESENTED

(1) May a newspaper, consistently with the First and Fourteenth Amendments to the United States Constitution, be convicted and subjected to criminal sanctions for its publication of truthful statements concerning a public official in connection with his public duties?

(2) Assuming *arguendo* that a newspaper may ever be convicted and subject to criminal sanctions for such conduct, may it, consistently with the First and Fourteenth Amendments to the United States Constitution, be convicted and subjected to criminal sanctions under Virginia Code § 2.1-37.13 in the absence of factual proof adduced in evidence proving beyond a reasonable doubt that its publication of a truthful report concerning the investigation of a named judge by a state judicial commission constituted a clear and present danger to the administration of justice?

(3) Is Virginia Code § 2.1-37.13, as interpreted by the Supreme Court of Virginia, unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution?

INTEREST OF THE AMICI

Amici are fifteen publishers of general circulation newspapers, two broadcasting companies, and the American Society of Newspaper Editors. They fre-

quently report to the public on the affairs of government, including matters involving the judiciary. *Amici* represent a broad spectrum of the American newspaper publishing and broadcasting industry. They are located in cities and towns in states as diverse as New York, Iowa, Kentucky, Tennessee, Illinois, and Virginia, among others. They are diverse in size—their newspapers have circulations ranging from over one million daily to under 25,000 daily, and the two broadcasting companies have in excess of 30 million viewers for their nightly news shows.

The Washington Post Company and its subsidiaries publish The Washington Post (cir. 530,031), The Trenton Times (cir. 72,787) and Newsweek (weekly cir. 2,900,000) and own and operate television and radio stations.

CBS Inc. operates national television and radio networks, and owns and operates television and radio stations.

National Broadcasting Company, Inc. operates national television and radio networks, and owns and operates television and radio stations.

Dow Jones & Company, Inc. publishes, *inter alia,* The Wall Street Journal (cir. 1,407,985) and, through its subsidiary, Ottaway Newspapers, Inc., 14 daily newspapers in various parts of the country (combined cir. 373,993).

The New York Times Company publishes The New York Times (cir. 803,123).

Field Enterprises, Inc. publishes the Chicago Sun-Times (cir. 566,127) and the Chicago Daily News (cir. 358,550).

Newsday, Inc. publishes Newsday (cir. 466,635).

The Globe Newspaper Company publishes The Boston Globe (cir. 461,960).

Philadelphia Newspapers, Inc. publishes The Philadelphia Inquirer (cir. 421,627).

The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc., publishes The Miami Herald (cir. 404,101).

The Pulitzer Publishing Company publishes The St. Louis Post-Dispatch (cir. 263,944), The (Tucson) Arizona Daily Star (cir. 60,442), and The Arizona Sunday Star (cir. 110,970).

Minneapolis Star and Tribune Company publishes The Minneapolis Star (cir. 235,361), Minneapolis Tribune (cir. 224,412), and Minneapolis (Sunday) Tribune (cir. 610,408).

Des Moines Register and Tribune Company publishes The Des Moines Register (cir. 224,094), Des Moines Sunday Register (cir. 425,161), Des Moines Tribune (cir. 91,736), and the Jackson (Tenn.) Sun (cir. 31,315).

The Courier-Journal and Louisville Times Company publishes The Courier-Journal (cir. 208,150), The Louisville Times (cir. 161,681), and The Courier-Journal & Times (Sunday cir. 345,052).

The Copley Press, Inc. publishes The San Diego Union (cir. 182,700) and San Diego Tribune (cir. 125,579).

Tennessean Newspapers, Inc. publishes The (Nashville) Tennessean (cir. 127,537).

The Free Lance-Star Publishing Co. of Fredericksburg, Va. publishes The Free Lance-Star (cir. 23,972).

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble), and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

All these *amici* would be adversely affected in their capacity to report the news to the American public if the decision of the Supreme Court of Virginia were permitted to stand.

STATEMENT OF THE CASE

The Virginian-Pilot, a Landmark newspaper, published an article on October 4, 1975, accurately describing a probe by the Virginia Judicial Inquiry and Review Commission [hereinafter "the Commission"] into the activities of a certain judge, who was identified in the article. The paper reported that "[n]o formal complaint has been filed by the Commission" against the judge, "indicating either that the five-man panel found insufficient cause for action or that the case is still under review." J. S. Appendix at p. 31a.

On November 5, 1975, Landmark was indicted by a Grand Jury of the Circuit Court of the City of Norfolk for its publication of the October 4th article. The Grand Jury charged that Landmark violated Virginia Code § 2.1-37.13 by "unlawfully divulg[ing] the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing" by the Commission.

Landmark moved to dismiss the indictment on the grounds that Virginia Code §2.1-37.13 did not apply to its publication, and could not be applied to its publication consistently with the First Amendment to the United States Constitution. Landmark's motion to dismiss the indictment was denied, and trial was held on December 10, 1975. Other than the charter, articles of amendment, and last annual report of Landmark, the only evidence against Landmark was a Stipulation which stated that *The Virginian-Pilot* was published by Landmark, a Virginia corporation; that an October 4, 1975 article published by Landmark identified a judge who had been the subject of an inquiry by the Commission; and that the Supreme Court of the Commonwealth of Virginia had not received a formal complaint from the Commission regarding the judge at the time the article was published. J.S. Appendix at p. 3a; 217 Va. at 701.[1]

The only witness at the trial, Mr. Joseph W. Dunn, Jr., Managing Editor of *The Virginian-Pilot*, testified on behalf of Landmark. Mr. Dunn testified that he decided to publish the article at issue because (1) a complaint had been filed against the judge some months before the Commission hearing; and (2) the news was of public importance. He acknowledged his understanding that revelation of information concerning Commission proceedings by an individual who had participated in those proceedings was a misdemeanor.

[1] Filing of a complaint with the Supreme Court of Virginia is significant in that the record then loses its confidential character. J. S. Appendix at pp. 4a-5a, 19a; 217 Va. at 702, 712.

But he stated that he did not believe that the statute applied to press reports of Commission proceedings. Mr. Dunn also testified that no reporter, employee, or agent of Landmark had participated in the Commission proceedings either under subpoena or otherwise.

Landmark was found guilty as charged on January 15, 1976. Fine was set at $500, and Landmark was ordered to pay the prosecution costs.[3] The order of the trial court made no mention of the constitutional and statutory arguments raised by Landmark.

The Supreme Court of Virginia upheld the Circuit Court decision by a 6-1 vote. The Court held that the statute was "clearly" applicable to Landmark and rejected Landmark's constitutional claims on the ground that there had been a "clear and well-defined legislative declaration" that such publication was "so contrary to the public interest" that it warranted criminal sanctions. J. S. Appendix at p. 14a; 217 Va. at 709. The Court concluded that the publication of information concerning the Commission would in every case be punishable as an "imminent and substantial threat to the orderly administration of justice," and that "courtroom evidence is unnecessary" to prove the particular publication's forbidden impact. J. S. Appendix at p. 15a; 217 Va. at 710. This determination was itself based on the Court's observation that the confidentiality of Commission proceedings serves three interests: it

> "(1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confi-

[3] Disclosure in violation of Virginia Code § 2.1-37.13 is a misdemeanor punishable by fine of up to $1000 and imprisonment for up to one year for each offense.

> dence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious." J. S. Appendix at p. 18a; 217 Va. at 712.

In his dissent, Justice Poff concluded that the statute "should be construed not to apply [to Landmark] in these circumstances," for unless the statute is so construed it "offends the First Amendment." J. S. Appendix at p. 19a; 217 Va. at 713.

A Notice of Appeal was filed by Landmark on April 15, 1977, and this Court noted probable jurisdiction on June 13, 1977.

Since the decision of the Supreme Court of Virginia in this case, two federal court judges have questioned the constitutionality of Virginia Code § 2.1-37.13 as applied to the press. On March 15, 1977, Judge Robert R. Merhige, Jr., of the United States District Court for the Eastern District of Virginia, issued a temporary injunction prohibiting prosecution of a Virginia television station under Virginia Code § 2.1-37.13 for broadcasting information relating to a pending Commission investigation. J. S. Appendix at p. 32a. That order subsequently expired by its own terms since litigation was not pressed.

On March 31, 1977 Richmond Newspapers, Inc. was indicted for two violations of Virginia Code § 2.1-37.13, and on April 29, 1977 was convicted and fined $1,000 for each violation.[4] Subsequently, Judge D.

[4] On April 5, 1977, the U.S. District Court for the Eastern District of Virginia, per Warriner, J., denied an application by Rich-

Dortch Warriner of the United States District Court for the Eastern District of Virginia entered a temporary restraining order and then a preliminary injunction prohibiting further criminal prosecutions against Richmond Newspapers, Inc. under Virginia Code § 2.1-37.13.[5] In support of the restraining order, Judge Warriner observed that Virginia Code § 2.1-37.13 prohibited publication of information that "a self-governing Commonwealth needs," and that "there is a grave question as to the constitutionality of this statute." Appendix to Supplemental Brief of Landmark at p. 5a. The preliminary injunction remains in effect at this time.

SUMMARY OF ARGUMENT

I.

The Commonwealth of Virginia has made it a crime for the press[6] to publish the truth about disciplinary proceedings against state judges. In doing so, the Com-

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mond Newspapers, Inc. for a temporary restraining order prohibiting prosecution. At that time Judge Warriner stated that although he believed the statute was unconstitutional, he could not hold that the statute was "patently and flagrantly unconstitutional" in view of the decision of the Supreme Court of Virginia, and thus could not enjoin the criminal prosecution. *Norfolk Ledger-Star*, April 6, 1977, p. A8.

[5] A temporary restraining order enjoining further prosecution of Richmond Newspapers, Inc. under Virginia Code § 2.1-37.13 for a ten day period was entered on May 3, 1977. On May 12, 1977, the order was extended until May 21, 1977. On May 20, 1977, a preliminary injunction was entered. Appendix to Supplemental Brief of Landmark at pp. 1a, 8a, 10a.

[6] We use the terms "press" and "publication" in this brief as terms of art that encompass "broadcasts" by the "electronic media."

monwealth seeks to deny the most basic principles underlying the command that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Those principles require that the dissemination of truthful facts concerning the affairs of government be protected.

Without accurate information about the operation of government, the issues with which government is concerned, and the stewardship of public officials, the people—the ultimate sovereigns—would be unable effectively and intelligently to govern themselves. Through the First Amendment, the Framers provided the vehicle for ensuring an informed citizenry, and selected the press to play a special role in that undertaking.

This Court has consistently recognized that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964). The principle is central to the line of cases beginning with *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and was reiterated in the Court's recent commercial speech decisions. These cases firmly establish the proposition that the government may not prevent the free flow of truthful information on the paternalistic ground that the citizenry is better off left in ignorance.

II.

Assuming *arguendo* that the state may under some circumstances impose criminal sanctions on the press for accurately reporting governmental affairs, the interests advanced by the Commonwealth of Virginia are wholly inadequate to sustain the imposition of sanctions pursuant to Virginia Code § 2.1-37.13.

The first interest advanced by the Commonwealth—protecting the reputation of individual judges—is not effectively promoted by the statute. The statute does not prevent anyone from publishing charges that a named judge is guilty of misconduct or incompetence; it merely prohibits everyone from publishing that the charges have been referred to the Commission. More fundamentally, a flat prohibition on speech in the interest of preserving the reputation of individual judges is barred by this Court's decision in *New York Times Co.* v. *Sullivan, supra.*

Like the first interest, the second interest advanced by the Commonwealth—preserving public confidence in the judicial system—is not effectively promoted by the statutory prohibition in this case. Moreover, the Commonwealth's attempt to further public confidence in its judicial system by limiting discussion of charges against its judges runs counter to the basic principles underlying the First Amendment. In *Bridges* v. *California,* 314 U.S. 252 (1941), this Court rejected out of hand the suggestion that respect for the judiciary could serve as the basis for any limitation on the public discussion of a judge's official conduct. And the *New York Times* and *Garrison* cases completely put to rest any contention that the State may limit speech concerning judges in order to preserve respect for, or confidence in, the judicial system.

The final interest asserted by the Commonwealth—its interest in protecting complainants and witnesses from possible recrimination—cannot support even a limited ban on the accurate identification of complainants and witnesses. It certainly cannot support a broad statutory prohibition like the instant one, which is not

restricted to speech that discloses or may lead to the disclosure of the identity of complainants and witnesses before the Commission.

III.

The "clear and present danger" test should have no application in this case. The test has clearly lost any claim for acceptance as a comprehensive standard for assessing the constitutionality of government restrictions on speech. And *New York Times Co.* v. *Sullivan, supra,* makes abundantly clear that "clear and present danger" analysis is unnecessary in assessing the main interests asserted by the Commonwealth in this case.

To the extent, however, that the "clear and present danger" test retains any vitality—as a minimum requirement that harm to the social order be imminent before speech may be proscribed—the standard reinforces the conclusion that the publication in this case is constitutionally protected.

The General Assembly's enactment of Virginia Code § 2.1-37.13 does not remove from the Commonwealth the burden of demonstrating that the particular publication at issue posed an imminent threat to the administration of justice. The Virginia Court's conclusion to the contrary was based on a wholly unsupported view of the legislative judgment behind Virginia Code § 2.1-37.13. More basically, the Virginia Court's conclusion reflected a degree of deference to legislative judgment that has long been rejected in First Amendment analysis.

There is no basis whatsoever, much less an evidentiary basis in the record, for concluding that appellant's identification of the judge who was the subject

of a Commission investigation posed an imminent threat to the administration of justice.

IV.

Virginia Code § 2.1-37-13 is unconstitutionally vague and overbroad.

Due process requires criminal statutes to be written with sufficient specificity to provide adequate notice to a person of reasonable intelligence that his contemplated conduct is illegal. When First Amendment rights are involved, even stricter standards of permissible statutory vagueness must be applied.

Landmark was forced to guess at the meaning of the word "divulge" in the statute, unaided by any statutory definition or legislative history as to its meaning.

In addition, Virginia Code § 2.1-37.13 is susceptible to such sweeping and improper application that it is void for overbreadth. On its face and as construed by the Supreme Court of Virginia, the statute prohibits disclosure of information concerning Commission proceedings regardless of whether any interest is served by confidentiality.

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS THE IMPOSITION OF CRIMINAL SANCTIONS ON THE PRESS FOR THE PUBLICATION OF ACCURATE REPORTS OF GOVERNMENTAL AFFAIRS

As definitively interpreted by the Supreme Court of Virginia, Virginia Code § 2.1-37.13 proscribes, without more, the truthful publication of the fact that the Virginia Judicial Inquiry and Review Commission has

investigated charges about the misconduct or incompetence of a public official—a named state judge. In this case, Landmark was convicted for the substantive content of its "pure speech"[7] solely on "stipulated facts showing Landmark had published the article in question, the Commission had investigated charges and conducted hearings concerning the judge named in the article, and, at the time of the publication, the Commission had not filed a complaint with [the Virginia Supreme] court respecting the judge." J. S. Appendix at pp. 11a-12a; 217 Va. at 707. In short, it is currently a crime in the Commonwealth of Virginia for the press to publish the truth about disciplinary proceedings against state judges.[8]

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[7] Compare, *e.g.*, *Cohen* v. *California*, 403 U.S. 15, 18 (1971), with *United States* v. *O'Brien*, 391 U.S. 367 (1968). See also *Hess* v. *Indiana*, 414 U.S. 105, 107 (1973); *Gooding* v. *Wilson*, 405 U.S. 518, 521-522 (1972).

[8] There is no contention that the speech proscribed by the statute falls within any of the limited categories of expression, such as obscenity or "fighting" words, which this Court has held to be unprotected by the First Amendment. See *Miller* v. *California*, 413 U.S. 15, 23 (1973); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942).

Nor is there any contention that the statute is simply a "time, place or manner" regulation because the record of the Commission's proceedings loses its confidential character if a complaint is filed with the Supreme Court of Virginia. If the Commission does not file a formal complaint, the prohibition against publication becomes permanent. In any event, a statute cannot be deemed a neutral time, place or manner regulation if it singles out certain speech because of its content and totally suppresses just that speech even for a temporary period of time; in such a situation, the state has not left open "ample alternative channels for communication of the [suppressed] information." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976), and cases cited therein. See *Young* v. *American Mini Theatres*, 427 U.S. 50, 71-72, n.35 (1976); *Linmark Associates* v.

In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964)—a criminal defamation case—this Court plainly delineated the principle that governs this case:

> "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Id.* at 74.

In other words, the dissemination of truthful facts concerning public affairs—particularly, the affairs of government—may not be proscribed, however laudatory the government's objectives.[9] This proposition flows ineluctably from the most basic principles underlying the command that "Congress shall make no law . . . abridging the freedom of speech, or of the press." [10]

Township of Willingboro, 45 U.S.L.W. 4441, 4443-4444 (U.S. May 2, 1977). This consideration is compelling with respect to news of public affairs, where timeliness is essential. *E.g.*, *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 560-61 (1976); *id.*, at 609 (Brennan, J., joined by Stewart and Marshall, J.J., concurring); *Bridges* v. *California*, 314 U.S. 252, 268-269, 277-278 (1941); *Wood* v. *Georgia*, 370 U.S. 375, 392 (1962); *Pennekamp* v. *Florida*, 328 U.S. 331, 346 (1946); see *Mills* v. *Alabama*, 384 U.S. 214 (1966).

[9] The one possible caveat would involve criminal sanctions for publication of national security secrets. See generally *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); see *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931). That issue is not involved in this case, and the Court should reserve any judgments on it until presented in a concrete factual setting. For even if there is such an exception, compare 403 U.S. at 719 (Black, J., concurring), with 403 U.S. at 733 (White, J., concurring), the constitutionality of the specific statute and its applicability to certain facts may be questioned. See 403 U.S. at 730 (Stewart, J., concurring). Indeed, in light of First Amendment concerns, the government may be required to prove, for example, that the truthful publication of national security secrets in fact damaged the national security. Cf. *Wood* v. *Georgia*, 370 U.S. 375, 393 (1962).

[10] The First Amendment, of course, applies with full vigor to the States by virtue of the Due Process Clause of the Fourteenth Amendment. *E.g.*, *Bigelow* v. *Virginia*, 421 U.S. 809 (1975); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Wood* v. *Georgia*, 370 U.S. 375 (1962).

The First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). Indeed, this Court has expressly recognized that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." [11] *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). The First Amendment thus promotes the most basic goal of a democratic system—an informed citizenry. It ensures that the people—the ultimate repository of power and sovereignty in our Republic—will have the ability effectively and intelligently to govern themselves.[12]

> "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. at 74-75.

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[11] The Court defined "governmental affairs" to include "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." 384 U.S. at 218.

[12] "Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power." A. Meiklejohn, *The First Amendment is an Absolute*, 1961 S. Ct. Rev. 245, 257.

See generally A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948); T. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963); Z. Chafee, Free Speech in the United States (1931).

The First Amendment expressly recognizes the special role of the press in guaranteeing that government is responsive to the will of an informed citizenry. As this Court observed in *Mills* v. *Alabama, supra:*

> "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus *the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.* Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." 384 U.S. at 219 (emphasis supplied).

Of course, the primary way in which the press guards against abuses of power and keeps elected officials responsible to the public is by informing the public about the affairs of government. The Court elaborated on this informational role of the press in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936):

> "The predominant purpose of [the free press guarantee] was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded

> otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Id.* at 250.

In *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), the Court once again stressed the public's reliance upon the press for accurate information concerning its government:

> "In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. *Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government,* and official records and documents open to the public are the basic data of governmental operations.[11] Without the information provided by the

[11] While official records open to the public may provide "the basic data of governmental operations," the facts of the instant case make clear that at least in the Commonwealth of Virginia they do not provide the complete data. Assuming *arguendo* that the Commonwealth may constitutionally deny access to information pertaining to the affairs of government—a question which this case does not present—it may not, *amici* submit, punish the press for publishing such information. The protection that the press enjoys to report on governmental affairs requires, at the very least, that it be permitted to publish what it learns.

Nothing in *Cox Broadcasting* is to the contrary. The Commonwealth places great weight on this Court's observation in that case that "[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." 420 U.S. at 496. Motion to Affirm at 4. But that observation does no more than state that if there are *private* matters that the state seeks to protect, it may do so only by keeping them off the public record. See also *id.* at 491. It certainly does not support the essentially limitless proposition advanced by the Commonwealth—that the

press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Id.* at 491-92 (emphasis supplied).

As these cases make abundantly clear, the most basic role of the press in our constitutional scheme is to provide the public with accurate information about public issues, the operation of government, and the stewardship of public officials. And the free dissemination of such information is essential, for without it the public cannot effectively and intelligently exercise its sovereign power.[14]

Accurate information concerning the affairs of government is crucial, *amici* stress, not only to the public's

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state may take concededly truthful non-private facts relating to the conduct of government and make their dissemination criminal by the simple expedient of declaring them "confidential." Under that proposition, the state could prohibit public commentary on criminal actions or impeachment proceedings against judges, legislators and executive officials—at least until a finding of probable cause is made.

[14] "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors must arm themselves with the power which knowledge gives."

Letter from Madison to W. T. Barry (Aug. 4, 1822), reprinted in 9 Writings of James Madison, at 103 (G. Hunt ed. 1910).

"The policy of the First Amendment favors dissemination of information and opinion." *Bigelow* v. *Virginia*, 421 U.S. 809, 829 (1975).

ability to control its government, but also to its ability to arrive at the wisest governmental policies. Central to the First Amendment's guarantees is the notion that political and economic "truth" will only be achieved when ideas are tested in the marketplace of public opinion.

> "The safeguarding of [First Amendment] rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education is essential to free government. *Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.* Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940) (emphasis supplied).[15]

Indeed, the utterances that may constitutionally be punished are those which "are no essential part of any exposition of ideas, and are of *such slight social value as a step to truth* that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hamp-*

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[15] See also *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Whitney* v. *California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring); *Stromberg* v. *California*, 283 U.S. 359, 369 (1931); *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949); *Wood* v. *Georgia*, 370 U.S. 375, 389 (1962); *Ashton* v. *Kentucky*, 384 U.S. 195, 199-200 (1966).

shire, 315 U.S. 568, 572 (1942) (emphasis supplied). If the goal of public discussion and debate is to arrive at political, economic, and social truth through the processes of education and counterargument, then it is clear that, at the very least, accurate factual statements concerning governmental affairs must be protected."[16]

This Court has on numerous occasions recognized the protection that the First Amendment extends to truthful statements concerning public affairs. In *Thornhill* v. *Alabama, supra*—a case involving dissemination of the facts of a labor dispute—the Court stressed "the public need for information and education with respect to the significant issues of the times," 310 U.S. at 102, in concluding:

> "The freedom of speech and of the press guaranteed by the Constitution embraces *at the least* the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or

[16] It is even impermissible for the state to excise a "scurrilous epithet" from the public discourse on the ground that it is "offensive" to most people, because "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen* v. *California,* 403 U.S. 15, 26 (1971). The state cannot make principled distinctions in this area, and there is an ever-present danger that empowering the government to delete language from the "verbal cacophony" that is this Nation's strength will ultimately lead to suppression of unpopular views. *Id.,* at 25-26.

If there is a danger that unpopular views and ideas on the most efficacious means to conduct or reform the government may be suppressed when the government punishes publication of particular *words,* that danger is magnified enormously if the government may punish the publication of concededly truthful *facts* pertaining to public officials or public affairs.

> fear of subsequent punishment." 310 U.S. at 101-02 (emphasis supplied).[17]

The conclusion that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned," although stated most concisely in *Garrison* v. *Louisiana, supra,*[18] is central to the entire line of cases beginning with *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). Those cases make clear that "the defense of truth is constitutionally required where the subject of the [defamatory] publication is a public official or public figure." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 490 (1975). Indeed, because factual errors are inevitable in free and vigorous debate, those cases hold that many false statements of fact must be protected from criminal or civil sanctions so as to allow adequate "breathing space" for truthful speech to flourish. *New York Times, supra,* at 271-72; *Garrison, supra,* at 74. "[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the

[17] The Court in *Thornhill* also noted that allowing punishment of truthful speech would permit tyranny of the governing majority:

> "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." 310 U.S. at 104.

[18] The Court in *Garrison* also noted its agreement with the New Hampshire court in *State* v. *Burnham,* 9 N.H. 34, 42-43, 31 Am. Dec. 217, 221 (1837):

> "If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice." 379 U.S. at 73.

First Amendment protect some erroneous publications as well as true ones." *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968).

The conclusion that truthful utterances concerning governmental affairs may neither be suppressed nor punished is also mandated by this Court's recent line of "commercial speech" cases. As the Court held in striking down Virginia's ban on advertisements of prescription drug prices by licensed pharmacists, a "State may [not] completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976). See also *Bates* v. *State Bar of Arizona*, 45 U.S.L.W. 4895 (U.S. June 28, 1977); *Carey* v. *Population Services International*, 45 U.S.L.W. 4601, 4606-07 (U.S. June 7, 1977); *Linmark Associates* v. *Township of Willingboro*, 45 U.S.L.W. 4441, 4443-44 (U.S. May 3, 1977); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

The Court's reasoning in *Virginia State Board* was based squarely, and expressly, on the principles of free speech applicable to matters of governmental concern. There is, the Court observed, a "First Amendment right to 'receive information and ideas,'" 425 U.S. at 757, quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972),[19] and "[p]urely factual matter of public interest may claim protection" under that

[19] See, *e.g.*, *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Marsh* v. *Alabama*, 326 U.S. 501, 505 (1946); *Martin* v. *Struthers*, 319 U.S. 141, 143 (1943); *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938).

Amendment. *Id.* at 762.[20] Society has a "strong interest in the free flow of commercial information," just as it does in the free flow of political information. *Id.* at 763-64. In both cases, the ultimate purpose is to "enlighten public decisionmaking in a democracy." *Id.* at 765. The State's arguments against the dissemination of truthful information, the Court observed, were based on the "reactions it is assumed people will have to the free flow of . . . information." *Id.* at 769. The State's position thus constituted "protectiveness of its citizens [based] in large measure on the advantages of their being kept in ignorance." *Ibid.* In language that is directly applicable to this case, the Court flatly rejected that position:

> "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. *It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.*" *Id.* at 770 (emphasis supplied).

Subsequently, these principles have been applied to protect truthful advertising of attorneys' fees for rou-

[20] "The protection of the public requires not merely discussion, but information." *New York Times Co.* v. *Sullivan*, 376 U.S. at 272, quoting *Sweeney* v. *Patterson*, 128 F.2d 457, 458 (1942), *cert. denied*, 317 U.S. 678 (1943). See also, *e.g.*, *Bigelow* v. *Virginia*, 421 U.S. 809 (1975); *Wood* v. *Georgia*, 370 U.S. 375, 388 (1962); *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940).

tine services, despite a host of interests allegedly served by prohibitions against such advertising, *Bates* v. *State Bar of Arizona,* 45 U.S.L.W. 4895 (U.S. June 28, 1977); truthful information concerning the availability and price of contraceptives, despite arguments that such information was offensive and might legitimate illicit sexual behavior, *Carey* v. *Population Services International,* 45 U.S.L.W. 4601, 4606-07 (U.S. June 7, 1977); and truthful "for sale" signs, despite arguments that they had to be proscribed to further the "vital goal" of stemming "white flight" from a racially integrated community, *Linmark Associates* v. *Township of Willingboro,* 45 U.S.L.W. 4441, 4444 (U.S. May 3, 1977).[21] See also *Bigelow* v. *Virginia,* 421 U.S. 809, 827-829 (1975).

The central teaching of these cases [22] is that the government may not prevent the free flow of truthful information on the paternalistic ground that the citizenry is better off left in ignorance; the government cannot proscribe the "content [of speech] because it fears [its] 'primary effect'—that [it] will cause those receiving the information to act on it." *Linmark Associates, supra,* at 4444. See also *Bates, supra,* at 4901-02. If there is a danger that truthful information will cause people to act contrary to their best interests, "the preferred remedy is more disclosure rather than less." *Ibid.* See also *Linmark Associates, supra,* at 4444. In short, greater education rather than enforced

[21] The Court in *Linmark* noted that the "First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information." 45 U.S.L.W. at 4444.

[22] In each of these cases, the Court struck down a legislative judgment that contravened the First Amendment.

silence is the constitutionally mandated means to correct any "detrimental" effects of truthful speech.

As this Court expressly recognized, the teaching of the recent commercial speech cases applies with equal, if not greater, force to speech concerning the affairs of government.[23] Indeed, the dangers of enforced silence are demonstrably greater in the arena of governmental affairs. Those dangers can be illustrated by the apparent constraining effects of the Virginia statute.[24] These effects all flow from the simple and impermissible expedient of prohibiting the dissemination of a truthful fact concerning a matter of governmental affairs—an official investigation into the conduct or character of a sitting judge:

1. The press has the responsibility to report on the administration of justice.[25] Yet if a judge resigns during or after a Commission investigation that reveals his incompetence or malfeasance, in order to avoid the

[23] See pp. 26-27, *supra*. The Court has made it clear that greater leeway for untruthful and misleading expression is required in the governmental and ideological arenas than in the commercial arena. *Bates, supra,* at 4904; *Virginia State Board, supra,* at 771-72 n.24; *id.* at 777-81 (Stewart, J., concurring).

[24] In discussing the effects of the statutory prohibition in this context, we will not address the statute's broader proscription against publication of Commission "proceedings" or the problems created by the statute's vagueness. See pp. 61-65, *infra*. Rather, the statutory evils will be explored in the context of the specific prohibition on the truthful publication of the name of a judge being investigated by the Commission when no formal complaint has been lodged by the Commission with the Supreme Court of Virginia. Similar arguments could be made with respect to sanctions on any specified truthful fact concerning public officials or public affairs.

[25] See, *e.g., Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 491-92, quoted *supra,* at 21-22; *Wood* v. *Georgia,* 370 U.S. at 391.

obloquy of formal public proceedings before the Virginia Supreme Court, it would be a crime to report the circumstances that led to the resignation. The public would thus be deprived of crucial information concerning the caliber of judicial appointments [26] and the possible need to reform the selection process. It would also be deprived of information that may be essential in deciding whether to legislate standards of judicial conduct or impose minimum qualifications for judges —for example, that they be trained as lawyers.

2. The press has the responsibility to uncover abuse of the public trust.[27] Yet it would be a crime to assert that the Commission members had improperly failed to investigate serious charges of incompetence about a named judge; it would even be a crime to report—to the public or to the Attorney General's office—that a named judge had bribed members of the Commission or witnesses to influence the outcome of an investigation into his activities. Neglect of duty and even criminal conduct would thus remain secret, and individuals who do not merit public trust would remain in positions of power. Litigants and the proper administration of justice would continue to suffer as a result.

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[26] There is a "paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant." *Garrison* v. *Louisiana*, 379 U.S. at 77.

[27] "[P]ublic men are, as it were, public property," and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." *Beauharnais* v. *Illinois*, 343 U.S. 250, 263-264 (1952), quoted in *New York Times Co.* v. *Sullivan*, 376 U.S. at 268. See also *Mills* v. *Alabama*, 384 U.S. at 218-19, quoted *supra*, at 20.

3. The press has the responsibility and duty to report on the institutions of government so that the citizenry may make informed judgments as to whether those institutions are operating effectively or whether they should be reformed.[28] Yet it would be a crime for the press to report comprehensively the results of all the Commission's investigations and the circumstances upon which its decisions were based. The press could not, for example, say that Judges A and B had not been disciplined under circumstances identical to those for which Judge C had been censured, nor could it explore the possible reasons for the disparate treatment. The public would thus be deprived of information essential to determine whether to legislate reform of its procedures or standardization of its criteria for discipline.

4. A public official has the responsibility to speak out on matters of public affairs, and the press has the responsibility to report those newsworthy comments. Yet it would be a crime for a legislator to assert, or for the press to report, that certain judges were being harassed by the Commission solely because of their judicial philosophies. Indeed, even the subject judge could not assert such harrassment or demand an investigation of the Commission or its members.

5. The press has the responsibility to insure that the electorate is informed about the qualifications of candidates for public office.[29] In Virginia, judges are

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[28] The protection of the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U.S. 476, 484 (1957).

[29] "Our chief magistrates and Senators are annually eligible by the people. How are their characters and conduct to be known to

elected by the General Assembly, whose members are themselves elected by the public. The Commission is "authorized," but apparently not required, to transmit to the chairman of the House or Senate Commiteee for Courts of Justice "evidence that it has in its possession with reference to the alleged misconduct of any judge whose term expires during such session of the General Assembly." Virginia Code § 2.1-37.17:1 (b).[30] If the Commission does not transmit relevant evidence to the General Assembly, the Assembly's ability to make an informed judgment will be seriously impaired. And even if the Commission does transmit evidence to the General Assembly, it may be a crime for the press to report to the people, the ultimate electors, the nature of that evidence and how their representatives acted upon it.

As the foregoing examples illustrate, truthful publication of the name of a judge who is the subject of a Commission investigation—like the publication of any other truthful fact about governmental affairs—is absolutely essential if the press is to fulfill its obli-

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their constituents but by the press? If the press is stopped and the people kept in Ignorance we had much better have the first magistrate and Senators hereditary." L. Levy, *Legacy of Suppression* 195 (1960) (John Adams' comments on Massachusetts "freedom of the press" clause).

[30] The Commission is only authorized to transmit evidence concerning a judge during the General Assembly session in which his term expires. The statute contains no authorization for the Commission to transmit evidence to the General Assembly in the event of impeachment proceedings, which are retained as an alternative route for removing judges from office. Virginia Constitution, Art. IV, § 17. Indeed, it would appear to be a crime for a legislator to refer to a Commission investigation in the course of an impeachment proceeding.

gations of exposing corruption of public officials and abuse of government power; of providing the citizenry with accurate information upon which to make intelligent political decisions and sound judgments about the necessity for government reform; of exposing apathy or incompetence of public servants; and of ensuring that ultimate sovereignty remains where it rightfully belongs—with the citizenry of this Nation.

Amici therefore urge this Court to reaffirm the basic proposition that the press may not be punished for the publication of accurate reports concerning the affairs of government. To reaffirm this proposition, *amici* stress, the Court need not consider whether different principles may govern the publication of truthful facts pertaining to wholly private matters. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 491, 496. Nor must it consider whether, or under what circumstances, the government may attempt to deprive the public of access to information—for example, by excluding the public from proceedings and requiring oaths of confidentiality from participants in the proceedings. The Court need only consider whether the government may, consistently with the First Amendment, punish the press for publishing such information as it may learn. *Amici* submit that it may not.

II. THE FIRST AMENDMENT PROHIBITS THE COMMONWEALTH OF VIRGINIA FROM ADVANCING ANY OF THE INTERESTS ASSERTED BELOW BY IMPOSING CRIMINAL SANCTIONS ON THE PRESS PURSUANT TO VIRGINIA CODE § 2.1-37.13.

Amici have contended that truthful statements about governmental affairs may not be punished, however laudatory the government's objectives. Even assum-

ing, however, that the general protection accorded truthful statements admits of exceptions, settled principles of law preclude the imposition of criminal sanctions under the statute involved in this case.

The chief purpose and effect of Virginia's broad statutory prohibition is, quite clearly, to limit public discussion of charges that have been leveled against judges. Attempts to shield judges and other public officials from criticism are not new to this Court, and without exception they have been met with hostility. In a series of four cases dating from 1941 to 1962, this Court invoked the First Amendment to reverse contempt convictions based upon out-of-court statements, some of which were harshly and unfairly critical of judges. *Bridges* v. *California,* 314 U.S. 252 (1941); *Pennekamp* v. *Florida,* 328 U.S. 331 (1946); *Craig* v. *Harney,* 331 U.S. 367 (1947); *Wood* v. *Georgia,* 370 U.S. 375 (1962).[31] And since these cases were decided, the Court has on numerous occasions addressed itself

[31] The statements at issue in those cases were far more offensive than the publication involved in this case. In *Bridges,* a newspaper had published an editorial, entitled "Probation for Guerillas?", stating that a judge would be making a "serious mistake" if he granted probation to two union members who had been convicted of assault. 314 U.S. at 271-72. And while a motion for a new trial was pending in a civil case, a labor leader had written that the judge's decision was "outrageous" and would lead to a strike if enforced. *Id.* at 275-77. The editorials and cartoon at issue in *Pennekamp* inaccurately and unfairly described the quashing of indictments and "wondered" whether the courts were being "subverted into refuges for lawbreakers." 328 U.S. at 337 n. 4. The publications in *Craig* inaccurately described a lay judge's rulings, and termed them "arbitrary action" and a "travesty on justice." 331 U.S. at 369, 374. And the publication at issue in *Wood* accused a sitting judge of "charging a Grand Jury in the style and language of a race baiting candidate for political office." 370 U.S. at 380.

specifically to the principal contentions advanced by the Commonwealth of Virginia in this case—in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and its progeny.

The Commonwealth of Virginia has contended, and the Supreme Court of Virginia concluded, that the broad statutory prohibition in this case serves three interests: it

> "(1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious." J.S. Appendix at p. 18a; 217 Va. at 712.

Amici note at the outset that the Commonwealth has made no attempt to suggest that its statute is designed to prevent improper influence upon the Commission's deliberations. Nor could there be any serious contention to that effect, since the statute sweeps broadly to prohibit all reports of Commission proceedings, not simply reports that may impair the Commission's ability to reach a fair and impartial resolution of charges pending before it. In this respect the instant case is a simpler one than *Bridges, Pennekamp, Craig,* and *Wood.* In those cases, the States' primary contention was that out-of-court statements had an improper influence upon pending judicial proceedings. Indeed, the only question upon which there was any disagreement among the Members of the Court in those cases was

whether the statements could be punished for posing a threat to the fair and impartial adjudication of pending controversies.

The main contentions advanced by the Commonwealth of Virginia in support of its statutory prohibition in this case were rejected out of hand and with unanimity in the contempt of court cases. And they were expressly and thoroughly rejected in the *New York Times* line of cases.

A. The Commonwealth's Interest in Protecting the Reputation of Individual Judges

The Commonwealth's interest in protecting the reputation of individual judges is wholly inadequate to support the legislative prohibition in this case. For one thing, the statute does not serve to protect the reputation of judges. As the Supreme Court of Virginia emphasized, the statute "does not curtail general comment or criticism concerning a judge or the conduct of his judicial affairs." J.S. Appendix at p. 19a; 217 Va. at 712. In other words, the statute does not prevent anyone from publishing charges that a named judge is guilty of misconduct or incompetence; it merely prohibits everyone from publishing that the charges have been referred to the Commission.[32] But

[32] It may be suggested that for this reason the statute is not intended to limit public discussion of charges against judges, but only to limit public discussion of the Commission. It cannot be denied, however, that the effect of the statute is to limit discussion of charges against judges. Indeed, the main interests advanced in support of the statute—protecting the reputation of individual judges and preserving public confidence in the judiciary by preventing publicity involving frivolous complaints—are promoted only to the extent that the statute succeeds in limiting public discussion of charges against judges. If the State's sole concern is that the Commission not be discussed in public, then these interests are wholly irrelevant to the Court's analysis; the only conceivable justification for the statute can be the third interest, protecting complainants and witnesses, an interest which this brief addresses in Part II(C).

the injury to reputation presumably flows from the publication of the charges themselves, not from the mere statement that the charges have been referred to the appropriate authorities. The statutory prohibition is, therefore, not likely to protect the reputation of judges. In fact, the statute in at least some instances would have precisely the opposite effect. While a newspaper could publish charges that a particular judge engaged in misconduct, it could not later report that the Commission found the charges to be without substance—indeed, even the judge himself would be barred from defending his reputation by referring to his vindication by the Commission. Since the Commonwealth's interest in protecting judges' reputations is not effectively promoted by the statutory prohibition, that interest surely cannot sustain it. See *Buckley* v. *Valeo*, 424 U.S. 1, 45 (1976); *Mills* v. *Alabama*, 384 U.S. 214, 220 (1966).

There is, in any event, a more fundamental defect in the Commonwealth's attempt to support a flat prohibition on certain kinds of speech by reference to its interest in preserving a judge's reputation. Such a flat prohibition is barred by this Court's decision in *New York Times Co.* v. *Sullivan, supra.* In that case, the Court emphasized our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes

unpleasantly sharp attacks on government and public officials." 376 U.S. at 270. Even erroneous statements, the Court reasoned, "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72. And in language directly applicable to this case, the Court concluded:

> "Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error." *Id.* at 272.

The *New York Times* Court thus expressly considered and rejected the first contention advanced in support of the statutory prohibition in this case. The Court squarely held that speech, even false speech, concerning public officials does not lose the protection of the First Amendment simply because it is injurious to the public official's reputation. Such speech forfeits the protection of the First Amendment only if it is published "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

The *New York Times* case was a civil libel case, but the Court has since made clear that the principles of *New York Times* "apply with no less force merely because the remedy is criminal." *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964). After *New York Times* and *Garrison*, the Commonwealth is clearly prohibited from imposing criminal sanctions for speech concerning public officials solely to protect their individual reputations."[11] See also *Pennekamp* v. *Florida*, 328 U.S. at 349.

[11] The Commonwealth cannot escape the clear command of *New York Times* and *Garrison* by its attenuated argument that the statute "preserves reputations while the corrective influence of the Commission is being exerted on a judge who would otherwise be reluctant to change his behavior lest the public view this as an admission of prior misconduct." J. S. Appendix, p. 17a; 217 Va. at 711, quoting Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, 3 U.S.F.L. Rev. 244, 255-56 (1968-1969). The argument of course, leads to a permanent, rather than temporary, ban on the discussion of Commission proceedings against judges inclined to submit to Commission pressure, for a judge will surely be as sensitive to the effect of future discussion of the charges as he is to past discussion. But any such ban—temporary or permanent—is clearly impermissible under this Court's decisions. *New York Times* and its progeny implicitly reject the contention that defamatory speech concerning public officials loses First Amendment protection because it may cause some damage to the institution in which the public official operates. See pp. 42-45, *infra*.

Even apart from *New York Times*, there can be no serious suggestion that the only way to put a stop to conduct deemed undesirable is to limit public awareness of the conduct. On the contrary, the very foundation of the First Amendment is that public awareness and discussion of the performance of public officials is the surest way to enforce the highest standards of conduct. See pp. 19-22, *supra*. The Commonwealth evidently takes the view that the truth may be withheld from the people because it fears that people will react "irrationally"—they may presume that a judge's modification of his behavior constitutes an admission of misconduct when in fact it does not. But "the preferred remedy" for that evil "is more disclosure rather than less." *Bates* v. *State Bar of Arizona*, 45 U.S.L.W. at 4901-02. See pp. 26-29, *supra*.

B. The Commonwealth's Interest in Preserving Public Confidence in the Judicial System

The second interest advanced by the Commonwealth —preserving public confidence in the judicial system —is no more substantial than the first. Indeed, it is virtually indistinguishable from the first. The Commonwealth's concern is simply that the disclosure of defamatory charges against a judge will necessarily undermine public confidence in the system in which he operates. But if the Commonwealth's interest in

protecting the reputations of judges cannot sustain the statute, neither can its interest in preserving public confidence in the judicial system.

Public confidence in the judicial system is not preserved by the statutory prohibition in this case. On the contrary, it is clearly undermined by a rule which, recognizing the right to publish charges of judicial misconduct, forbids reference to the fact that the charges are being investigated—and even forbids reference to the fact that the charges have been found to be without merit. The former prohibition invites the public to form the impression that the system is not concerned with policing itself, the latter that frivolous charges have merit. In the most immediate sense, the statutory prohibition in this case is ineffective in promoting public confidence in the judicial system. For this reason alone the interest in promoting public confidence cannot sustain the statute. See *Buckley* v. *Valeo*, 424 U.S. at 45; *Mills* v. *Alabama*, 384 U.S. at 220.

On an even more fundamental level, however, the Commonwealth's attempt to further public confidence in its judicial system by limiting discussion of charges against its judges runs counter to the basic principles underlying the First Amendment. In *Bridges*, this Court rejected out of hand the suggestion that respect for the judiciary could serve as the basis for any limitation, however narrow, on the public discussion of a judge's official conduct:

> "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, *however limited*, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." 314 U.S. at 270-71 (emphasis added). See also *Pennekamp* v. *Florida*, 328 U.S. at 349.

This conclusion in *Bridges*, from which there was no dissent,[24] is not simply an empirical judgment that the

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[24] Mr. Justice Frankfurter, joined by three other Members of the Court, dissented from the judgment in *Bridges* on the ground that the out-of-court statements threatened the "impartial disposition" of a pending judicial proceeding—a question which, *amici* repeat, is not presented in this case. But Mr. Justice Frankfurter and the other dissenters were in complete agreement with the Court's conclusion that out-of-court statements could not be punished in order to promote respect for the judiciary:

> "The purpose, it will do no harm to repeat, is not to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed. The purpose is to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal." 314 U.S. at 291-92 (Frankfurter, J., dissenting).

Mr. Justice Frankfurter restated his view in *Craig* v. *Harney*, 331 U.S. at 389 (Frankfurter, J., dissenting):

> "We are not dealing here with criticisms, whether temperate or unbridled, of action in a case after a judge is through with it, or of his judicial qualifications, or of his conduct in general. Comment on what a judge has done—criticism of the judicial process in a particular case after it has exhausted itself—no matter how ill-informed or irresponsible or misrepresentative, is part of the precious right of the free play of opinion. Whatever violence there may be to truth in such utterances must be left to the correction of truth."

See also *Pennekamp* v. *Florida*, 328 U.S. at 350 (Frankfurter, J., concurring).

Commonwealth of Virginia is free to ignore. It is mandated by the principles of free debate underlying our democratic form of government. See pp. 19-24, *supra*.

The *New York Times* case completely puts to rest any contention that the state may limit speech concerning judges in order to preserve respect for, or confidence in, the judicial system. *New York Times* was itself a libel case, directly involving only the interest of a public official in his individual reputation. But when the Court announced that speech concerning a public official does not forfeit First Amendment protection simply because of its defamatory content, the Court did not restrict its vision to the effect of speech on individual reputation. The Court was fully aware that speech that injures the reputation of a public official may also tarnish the image of the system in which he operates. And the broad principles the Court articulated were not confined to the punishment of speech in the name of protecting the individual reputations of public officials; they clearly embraced attempts to punish speech in the name of protecting the institutions of government.

Thus, the Court expressly noted and approved history's rejection of the Sedition Act of 1798, which made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Act was "inconsistent with

the First Amendment," the Court concluded, "because of the restraint it imposed upon criticism of government and public officials." 376 U.S. at 276.

With particular respect to the judicial system, the *New York Times* Court expressly reaffirmed that

> "concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision . . . . This is true even though the utterance contains 'half truths' and 'misinformation.' " 376 U.S. at 272-73 (citations omitted).

That the judiciary stands on no special footing was forcefully demonstrated by the Court's decision in *Garrison* v. *Louisiana, supra*.[35] In that case, a district attorney was convicted under a criminal contempt statute for issuing a statement that criticized the behavior and impugned the motives of all eight judges of a local criminal court.[36] Against these facts, the Court in *Garrison* was faced with the question "whether, in view of the differing history and purposes of criminal libel, the *New York Times* rule also limits state power to impose criminal sanctions for criticism of the official conduct of public officials." 379 U.S. at 67. In address-

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[35] See also *Bates* v. *State Bar of Arizona*, 45 U.S.L.W. at 4900, in which the Court rejected the notion that attorney advertising may be proscribed on the ground that it would "erode the client's trust in his attorney" and "tarnish the dignified public image of the profession."

[36] The statement attributed a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations of the judges; charged that the judges had hampered his efforts to enforce vice laws; and raised questions about "the racketeer influences on our eight vacation-minded judges." 379 U.S. at 66.

ing this question, the Court did not even pause to consider whether any possible harm to the public image of the judicial system called for a modification of the broad protection of *New York Times*. "Where criticism of public officials is concerned," the Court concluded, "we see no merit in the argument that criminal statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations." *Ibid.*

After *Bridges, New York Times,* and *Garrison*, the command of the First Amendment could not be made more clear: speech concerning the conduct of judges may not be prohibited in the name of preserving public confidence in the judicial system. The command, it bears emphasis, is an unqualified one. While *Bridges* was decided when the clear and present danger test reigned as the general test for judging the constitutional validity of restraints on speech, its rejection of public respect for the judiciary as a justification for restraint on speech was absolute. And *New York Times* and its progeny do not hold that speech may be punished if it poses a clear and present danger to the state's interest in preserving confidence in, and respect for, the institutions of government;[17] they hold flatly

[17] *New York Times* does say that the criminal contempt sanction for criticism of a judge "can be justified, *if at all*, only by a clear and present danger of the *obstruction of justice*." 376 U.S. at 273 (emphasis added). But this reference to "clear and present danger" did not qualify the Court's flat statement that "concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision." *Id.* at 272-73. The reference was expressly restricted to instances of "obstruction of justice." The Court was merely leaving open a question not presented in that case or in the instant case—whether out-of-court statements can be punished upon a showing that they pose a clear and present, or imminent, threat to the fair and impartial adjudication of a pending controversy.

It has been suggested that the *New York Times* Court could have chosen to apply the clear and present danger test to the issues before it, as it had been urged to do a decade before in *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952), and that the Court's decision in *New York Times* marks the demise of the clear and present danger test. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 S. Ct. Rev. 191, 213-14. See also Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1, 8-10, 14-15 (1965).

that speech does not lose the protection of the First Amendment simply because it damages the reputation of public officials or tarnishes the image of our governmental institutions.

As an attempt to preserve public confidence in its judicial system, Virginia's statutory prohibition is invalid on its face.

C. The Commonwealth's Interest in Protecting Complainants and Witnesses Before the Commission

The final interest asserted in support of Virginia's statutory prohibition is its interest in "protect[ing] complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious," and thereby encouraging citizens to provide information relating to the conduct of judges.

There is no contention that this interest is directly implicated in this case. Nor could there be such a contention since the publication in question merely disclosed the identity of the judge under investigation, not the identities of any complainants or witnesses.

While *amici* contend that even a limited ban on the accurate identification of complainants and witnesses would violate the First Amendment,[38] there is no need for the Court to consider that question. For even assuming that the Commonwealth's interest in preserving the anonymity of complainants and witnesses could support such a limited ban, it clearly cannot support Virginia's broad prohibition on *all* speech concerning Commission proceedings.

Such a broad prohibition violates the cardinal principle that legislative enactments must be "closely drawn

[38] As an initial matter, *amici* note that any prohibition on publishing the identities of complainants and witnesses will be wholly ineffective unless the Commission proceedings themselves are conducted in such a way as to prevent the judge under investigation from learning the identity of those who bring and support the charges against him. There is no assurance under the present statute that the Commission proceedings are so conducted.

In addition, there is no reason whatsoever to believe that a ban on speech is necessary to accomplish the state's purposes. Actual recrimination by a judge against complainants and witnesses against him is easily and effectively prevented by means short of prohibiting speech—namely, by a rule disqualifying the judge in matters involving litigants or lawyers who have provided information against him. And it is the assurance that ours is a system in which charges can be openly aired and resolved without recrimination that must ultimately serve as the encouragement for citizens to come forward with such information as they may have.

There is, in fact, reason to believe that a ban on the identification of complainants and witnesses would run counter to the Commonwealth's interests. Public awareness of the identities of complainants and witnesses would serve as a powerful deterrent to a judge's taking recriminatory measures. And publishing the names of reputable citizens who have provided information to the Commission may firm up the resolve of others to step forward.

Finally, if any assurance of confidentiality is deemed necessary to encourage citizens to exercise their responsibility to come forward with information, the Commonwealth is hard-pressed to explain why a pledge of confidentiality among the participants in the proceeding would not suffice.

to avoid unnecessary abridgment" of First Amendment rights. *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976). As this Court explained in *Kusper* v. *Pontikes*, 414 U.S. 51, 59 (1973):

> "[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. 'Precision of regulation must be the touchstone in an area so closely touching most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." (Citations omitted).

See also *United States* v. *Robel*, 389 U.S. 258, 265, 268 (1967); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

There are far less drastic means to protect the anonymity of complainants and witnesses than a prohibition on all references to Commission proceedings.

III. THE PUBLICATION IN QUESTION IS PROTECTED BY THE FIRST AMENDMENT IN THE ABSENCE OF ANY EVIDENCE THAT IT CREATED AN IMMINENT THREAT TO THE ADMINISTRATION OF JUSTICE.

The Supreme Court of Virginia, in upholding the constitutionality of Virginia Code § 2.1-37.13, concluded that its strict limitations on speech were necessary to prevent a clear and present danger to the administration of justice. It is *amici's* position that the "clear and present danger" test should have no application in this case. The test has clearly lost any claim for acceptance as a comprehensive standard for assessing the constitutionality of government restrictions on speech. And the *New York Times* case makes abundantly clear that "clear and present danger" analysis is

unnecessary in assessing the interests asserted by the Commonwealth in this case. To the extent, however, that the "clear and present danger" test retains any vitality—as a minimum requirement that harm to the social order be imminent before speech may be proscribed—the standard reinforces the conclusion that the publication in this case is constitutionally protected.

A. The First Amendment Requires, at a Minimum, that Speech Concerning the Administration of Justice be Protected in the Absence of Evidence of an Imminent Threat to the Administration of Justice.

In describing the "minimum compulsion" of the First Amendment, *Bridges* v. *California*, 314 U.S. at 263, this Court has stated in each of the four contempt cases cited above that speech may not be punished if it does not pose a "clear and present danger" to the fair administration of justice. *Id.*, at 261-63; *Pennekamp* v. *Florida*, 328 U.S. at 334-36, 347-50; *Craig* v. *Harney*, 331 U.S. at 372-78; *Wood* v. *Georgia*, 370 U.S. at 384-88. At the time *Bridges*, *Pennekamp*, and *Craig* were decided, the "clear and present danger" test—first articulated by Mr. Justice Holmes in *Schenck* v. *United States*, 249 U.S. 47 (1919) [39]—was widely accepted as a convenient measure of the constitutionality of various government restrictions on speech. See

[39] Justice Holmes' statement of the test in *Schenck* was as follows:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." 249 U.S. at 52.

Bridges, 314 U.S. at 262.[40] But since then the Court's use of "clear and present danger" terminology has steadily declined.[41] Indeed, the last case in which this

[40] The "clear and present danger" test had its initial application in a series of cases in which criminal charges under the Espionage Act of 1917 were grounded upon publications deemed to pose a threat to the country's war effort in World War I. *Schenck* v. *United States*, 249 U.S. 47 (1919); *Frohwerk* v. *United States*, 249 U.S. 204 (1919); *Debs* v. *United States*, 249 U.S. 211 (1919); *Abrams* v. *United States*, 250 U.S. 616 (1919); *Schaefer* v. *United States*, 251 U.S. 466 (1920); *Pierce* v. *United States*, 252 U.S. 239 (1920).

The "clear and present danger" standard was later invoked unsuccessfully by Mr. Justice Holmes and Mr. Justice Brandeis in the criminal anarchy and criminal syndicalism cases, in which criminal charges were brought pursuant to state statutes proscribing advocacy of violence as a means of accomplishing industrial or political change. *Gitlow* v. *New York*, 268 U.S. 652 (1925); *Whitney* v. *California*, 274 U.S. 357 (1927), *overruled*, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

Later, the Court applied the "clear and present danger" standard to evaluate statutes prohibiting picketing, *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), and regulating public solicitation on behalf of charitable organizations. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

When *Terminiello* v. *Chicago*, 337 U.S. 1 (1949), was decided at the close of the 1940's, all of the Members of the Court who addressed the merits of the case agreed on the applicability of the "clear and present danger" test.

[41] The decline of the "clear and present danger" test was due in part to the inadequacies of the test itself and in part to the perplexities of more recent speech cases, in which application of the test would prove difficult, if not impossible. But the decline can also be attributed in large part to the "reinterpretation" of the test in the Smith Act cases, discussed in note 46 *infra*. See *e.g.*, Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 S.Ct. Rev. 191, 213; Strong *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 S. Ct. Rev. 41, 53ff.

The "clear and present danger" test, it should be noted, has been much criticized by commentators. See, *e.g.*, Corwin, *Bowing Out "Clear and Present Danger,"* 27 Notre Dame Lawy. 325

Court expressly employed the "clear and present danger" test to evaluate whether "pure speech" fell outside the protection of the First Amendment was *Wood,* decided in 1962;[42] and in that case the Court applied the test for the sole purpose of assessing a claim, not present in this case, that speech posed a threat to the fair resolution of a pending judicial proceeding.[43]

The "clear and present danger" test has quite apparently lost any claim for acceptance as a comprehensive standard for assessing the constitutionality of government restrictions on speech. What remains of Mr. Justice Holmes' standard, *amici* submit, is a statement of the *minimum* command of the First Amendment in a limited category of cases. When the govern-

(1952); Freund, The Supreme Court of the United States 42-44 (1961); Emerson, *Toward a General Theory of the First Amendment,* 72 Yale L.J. 877, 910-12 (1963); Kalven, *supra,* at 213-14; Krislov, The Supreme Court and Political Freedom 89-90, 122 (1968); Strong, *supra.*

[42] "Clear and present danger" language has since been employed in two speech-plus-conduct cases. In *Edwards* v. *South Carolina,* 372 U.S. 229 (1963), the Court referred to the test in holding that the First Amendment precluded the state from imposing criminal sanctions upon a group of Negro college students peacefully picketing on the grounds of the state capitol. And in *Cox* v. *Louisiana,* 379 U.S. 559 (1965), the Court upheld convictions for picketing near a courthouse on the ground that, assuming the applicability of the clear and present danger test, the *conduct* engaged in by the picketers met that test.

[43] It may well be that the notion of "clear and present danger" retains some vitality in cases like *Wood* and the prior contempt cases, in which it is claimed that out-of-court statements threaten the fair and impartial resolution of a pending proceeding. See *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976). Even in this limited context, however, *amici* submit that the notion is of relevance only as a *minimum* command of the First Amendment. See discussion *infra.*

ment seeks to restrict speech because of the effect of the ideas conveyed upon the social order or the operation of government, the minimum requirement of the First Amendment is that the harm apprehended be so imminent that there is no time for counterpersuasion. The contempt of court cases—*Bridges, Pennekamp, Craig,* and *Wood*—leave no doubt about this principle. The "clear and present danger" cases, the *Bridges* Court observed, "do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights." 314 U.S. at 263; See also *Wood,* 370 U.S. at 384 n.6.[44] That minimum compulsion was clearly expressed by the Court in *Craig:*

> "The fires which [the speech] kindles must constitute an imminent, not merely a likely threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." 331 U.S. at 376.

[44] The "minimum compulsion" described by the *Bridges* court embraced not only a requirement that the harm apprehended be imminent, but also a requirement that "the substantive evil . . . be extremely serious." 314 U.S. at 263. In *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969)—a case in which the state sought to punish speech because of the threat of imminent violence or lawless action—the Court focused on the nature of the speech as well as its likely consequences; it imposed an additional requirement that the speech constitute *advocacy* of the imminent use of violence or law violation—a category of speech that quite obviously does not embrace accurate factual reports of the affairs of government.

In different contexts, still other requirements may be appropriate. And, of course, First Amendment adjudication is always guided by certain general principles frequently applied by this Court—for example, the related requirements that the state's means bear more than a rational relationship to its purpose, see, *e.g., Thomas* v. *Collins,* 323 U.S. 516, 530 (1945), and that no less restrictive means be available, see p. 47, *supra.*

See also *id.* at 373; *Bridges,* 314 U.S. at 263; *Pennekamp,* 328 U.S. at 334; *Wood,* 370 U.S. at 385. In *Wood,* the Court interpreted this language to require a showing of an "actual interference with the undertakings of the grand jury." *Id.* at 393.

The same requirement of imminence governs attempts to punish speech deemed harmful to other institutions of government or to the maintenance of order itself. Thus, in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969), the Court invalidated the Ohio Criminal Syndicalism statute by applying the following standard:

> "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action." *Id.* at 447 (emphasis added)."

The requirement of imminent harm received special emphasis in *Hess* v. *Indiana,* 414 U.S. 105, 108-09 (1973). There the Court set aside a disorderly conduct conviction because of the lack of evidence, required by the First Amendment, that the defendant's words "were intended to produce, and likely to produce, *imminent* disorder." *Id.* at 109 (emphasis in original). *See also Communist Party of Indiana* v. *Whitcomb,* 414 U.S. 441 (1974)."

" It is noteworthy that in restating the principle that harm must be imminent before speech may be punished, the *Brandenburg* Court did not employ "clear and present danger" terminology.

" In modern times it was only in the Smith Act cases that the Court, faced with what it perceived to be a peculiar threat posed by international communism, compromised the requirement that

This minimum requirement that the harm apprehended be imminent was an integral part of the clear and present danger test envisioned by Holmes and Brandeis. Mr. Justice Brandeis explained the basis and content of the requirement in *Whitney* v. *California,* 247 U.S. 357 (1926) (Brandeis, J., concurring):

> "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, *unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.* If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with

the harm apprehended be imminent before speech may be punished. See *Dennis* v. *United States,* 341 U.S. 494, 503-10 (1951); *Yates* v. *United States,* 354 U.S. 298 (1957); *Scales* v. *United States,* 367 U.S. 203 (1961); *Noto* v. *United States,* 367 U.S. 290 (1961). In those cases the Court held that

> "indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' . . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur." *Yates,* 354 U.S. at 321.

As the discussion in the text so clearly illustrates, the requirement that the harm apprehended be imminent has been fully restored by the Court. Indeed, in *Communist Party of Indiana* v. *Whitcomb,* 414 U.S. 441 (1974), the Court reaffirmed the requirement of imminent harm in the only context in modern times in which it had ever been compromised.

freedom. Such, in my opinion, is the command of the Constitution." *Id.* at 377 (emphasis added)."

In a nation committed to the proposition that "the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams* v. *United States,* 250 U.S. 616, 630 (Holmes, J., dissenting), punishment of speech concerning governmental affairs because of its possible harmful effect is inherently suspect. When the harmful effect is less than imminent and there is ample opportunity to guard against it through counterpersuasion, there can be no basis whatsoever for interfering with the free debate envisioned by the First Amendment;[47] the speech must be protected.

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[47] See also *Thornhill* v. *Alabama,* 310 U.S. 88, 104-05 (1940); *Abrams* v. *United States,* 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting):

> "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command [of the First Amendment]."

[48] "Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the expression. Under our system of government, counter-argument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly." *Wood* v. *Georgia,* 370 U.S. at 389.

See also *id.* at 391.

B. The General Assembly's Enactment of Virginia Code § 2.1-37.13 Does Not Remove from the Commonwealth the Burden of Demonstrating that the Particular Publication at Issue Posed an Imminent Threat to the Administration of Justice.

In *Bridges, Pennekamp, Craig,* and *Wood,* the Court engaged in close scrutiny of the particular statements at issue to determine whether they fell within the protection of the First Amendment. As the Court stated in *Pennekamp,* this independent review of the particular facts at issue is required by the Court's role as final arbiter of the meaning of the Constitution:

> "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." 328 U.S. at 335.

In each of the four cases, the Court concluded that the particular utterances in question were protected by the First Amendment.

The Commonwealth of Virginia has argued, and the Supreme Court of Virginia concluded, that this particularized scrutiny of the factual predicate for a conviction is unnecessary when the conviction is based on a statute. In contrast to the contempt convictions addressed by this Court in prior cases, the Supreme Court of Virginia noted, the conviction in this case "springs from a clear and well-defined legislative dec-

laration that breach of the confidentiality of Commission proceedings is so contrary to the public interest that it constitutes a substantive evil of immediate and serious peril to the orderly administration of justice." J. S. Appendix at pp. 14a-15a; 217 Va. at 709. Given this legislative declaration, the Supreme Court of Virginia reasoned, there was no need to examine the particular circumstances that led to appellant's conviction; it was sufficient, the Court concluded, that the general evils to which the statute was directed were "serious and substantial." J.S. Appendix at p. 15a; 217 Va. at 710. In support of its view that the legislative enactment of Virginia Code § 2.1-37.13 eliminates the need for the particularized factual scrutiny that characterized this Court's decisions in *Bridges, Pennekamp, Craig,* and *Wood,* the Supreme Court of Virginia referred to language in *Bridges.* Citing *Gitlow* v. *New York,* 268 U.S. 652, 671 (1925), the *Bridges* Court had written:

> "[T]he legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation." 314 U.S. at 260-61.

The Supreme Court of Virginia's reliance upon this language in *Bridges* is wholly misplaced. For one thing, it is not at all clear that the Virginia legislature made a judgment that the criminal sanction should be applied against anyone other than the person who first discloses information.[49] But even assuming that the legislative judgment extended to those who republish

[49] See pp. 61-65, *infra.*

divulged information, the legislative judgment is so lacking in specificity as to be unworthy of any judicial deference. The statute is written in extremely broad, general terms—covering "[a]ll papers filed with and proceedings before the Commission," and it can hardly be said that the Virginia legislature "appraised a *particular* kind of situation and found a *specific* danger sufficiently imminent to justify a restriction on a *particular* kind of utterance." *Ibid.* (emphasis added). There is certainly nothing in the legislative history of the provision to suggest that the Virginia legislature made the rigorous determination of imminent danger that the First Amendment requires. The Supreme Court of Virginia proceeded on a wholly unsupported view of the legislative judgment behind Virginia Code § 2.1-37.13.

There is, moreover, a far more fundamental error in the Virginia Court's conclusion that the existence of a statute punishing certain forms of speech removes the necessity for a judicial determination that a particular statement is unprotected by the First Amendment. The conclusion reflects a degree of deference to legislative judgment that has long been rejected in First Amendment analysis. The approach of the Virginia Court is essentially the now-discredited approach followed by this Court in *Gitlow* v. *New York,* 268 U.S. 652 (1925), and *Whitney* v. *California,* 274 U.S. 357 (1927), overruled in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969).

In *Gitlow* and *Whitney*—which, unlike the prior "clear and present danger" cases,[50] involved statutes

[50] In the prior cases criminal charges were brought under the Espionage Act of 1917, which in general prohibited conspiracies

directed to certain kinds of speech—the Court concluded that it was unnecessary to assess the danger posed by a particular utterance within the scope of the statute's proscription.[51]

This approach has been throughly repudiated. It is the opinions of Mr. Justice Holmes and Mr. Justice Brandeis in *Gitlow* and *Whitney* that have since been accepted as accurate statements of the law. See *Dennis* v. *United States*, 341 U.S. 494, 506-07 (1951) (Opinion of Vinson, C.J.), 536-37, 541 (Frankfurter, J., concurring). Mr. Justice Brandeis stated the governing principles in these words:

> "[A legislative declaration] does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. As a statute, even if not void on its face, may be challenged because invalid as applied, . . . the result of such an enquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was

and attempts to obstruct military recruiting or otherwise interfere with the nation's war effort. See note 40, *supra*. The statute did not expressly forbid speech; in each case the speech merely provided the evidentiary basis for the conviction.

[51] "[W]hen the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such a danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration." *Gitlow* v. *New York*, 268 U.S. 652, 670 (1925). See also *id.* at 671.

> imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature." *Whitney* v. *California*, 274 U.S. at 378-79 (Brandeis, J., concurring).

See also *Gitlow* v. *New York*, 268 U.S. at 672-73 (Holmes, J., dissenting); *Taylor* v. *Mississippi*, 319 U.S. 583, 589-90 (1943); *Watts* v. *United States*, 394 U.S. 705 (1969); *Brandenburg* v. *Ohio*, *supra*.

To the extent, then, that *Bridges* contains any implication that a particular application of a statute directed at speech need not be justified by the particular circumstances of its application, that implication was based upon decisions that have long since been repudiated," and it can have no bearing whatsoever on this case.

C. The Publication at Issue Did Not Pose an Imminent Threat to the Administration of Justice.

The publication involved in this case accurately reported that the Judicial Inquiry and Review Commission was conducting a formal hearing on charges that a named Juvenile and Domestic Relations Court

[52] The very language in *Bridges* upon which the Virginia Court relied was accompanied by a citation to *Gitlow* and was quite clearly included in the Court's opinion in order to distinguish *Gitlow*. In *Wood* v. *Georgia*, 370 U.S. at 386, the Court, quoting *Bridges*, observed that the contempt judgment did not come to the Court "encased in the armor wrought by prior legislative deliberation." This language was evidently intended to emphasize that the Georgia Court of Appeals ignored the express limitations imposed by the Georgia Legislature in punishing out-of-court statements; the language carried no implication that the Court's particularized scrutiny of the facts underlying the contempt conviction in that case would have been unnecessary if the conviction had been based upon a statute barring certain out-of-court statements.

Judge was incompetent. The article described the function and procedures of the Review Commission, and summarized the status of its inquiry in the particular case as follows: "No formal complaint has been filed by the Commission against [the judge], indicating either that the five-man panel found insufficient cause for action or that the case is still under review." Appellant's crime was to "unlawfully divulge the identification of a Judge" who was the subject of a Commission investigation.

There is no basis whatsoever, much less an evidentiary basis in the record, for concluding that appellant's identification of the judge who was the subject of a Commission investigation posed an imminent threat to the administration of justice. The Commonwealth contends that the article at issue may have undermined public confidence in the judicial system and its judges.[33] As an initial matter, *amici* note that the Commonwealth has not even offered any evidence to suggest that the underlying charge of incompetence against the judge was not meritorious. Regardless of the merits of the charge, however, the article presented a balanced report that was as likely to further public confidence in judges and the judicial system as undermine it. For the article gave the public the assurance that when charges of incompetence are made, they are investigated by a panel specially created for that purpose. Finally, assuming *arguendo* that the article may have lessened public confidence in the judiciary, it did not thereby create the kind of imminent threat to the administration of justice that the First Amendment

[33] Since the article identified only the judge, not any complainants or witnesses, it created no danger of recriminations.

requires. See *Bridges,* 314 U.S. at 270; *Pennekamp,* 328 U.S. at 349. For whatever unfair adverse inferences individual members of the public may have drawn from the article can clearly be cured by counter-persuasion.

IV. VIRGINIA CODE § 2.1-37.13 IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD

In the preceding sections, *amici* have contended that the publication at issue in this case is protected by the First Amendment. Assuming *arguendo* that Landmark's publication may be the subject of criminal sanctions, Virginia Code § 2.1-37.13 must still fail on vagueness and overbreadth grounds.

A. Vagueness

Landmark was indicted and convicted for violating the Virginia Code's prohibition on "divulg[ing]" information concerning the Virginia Judicial Inquiry and Review Commission. In the Virginia courts, Landmark contended that the operative word of the statute, "divulge," encompassed only the first act of disclosure by a participant in Commission proceedings, and not subsequent publication by the press. The Supreme Court of Virginia, while agreeing with Landmark that the statute should be strictly construed, rejected Landmark's interpretation of the statute. The word "divulge," it concluded, "means to disclose [information] or to make it known," and encompasses all publications up to the time a formal complaint against a judge is filed with the Supreme Court. J.S. Appendix at pp. 4a-5a; 217 Va. at 702. As so construed, the statute is void for vagueness.[34]

[34] *Amici* note that Virginia Code § 2.1-37.13 is vague in other

This Court has consistently held that due process requires criminal statutes to be written with sufficient specificity to provide adequate notice to persons of reasonable intelligence that their contemplated conduct is illegal. As the Court declared in *Hynes* v. *Borough of Oradell*, 425 U.S. 610 (1976):

> "No one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." 425 U.S. at 620, quoting from *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

See also *Buckley* v. *Valeo*, 424 U.S. 1, 77 (1976); *Winters* v. *New York*, 333 U.S. 507, 515 (1948); *Pierce* v. *United States*, 314 U.S. 306, 311 (1941); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926)."[55] When First

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respects as well. On its face, the statute prohibits disclosure of

> "[a]ll papers filed with and proceedings before the Commission, and under the two preceding sections [§§ 2.1-37.11 and 2.1-37.12], including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter . . . ."

Nothing in the record indicates that Landmark's publication constituted disclosure of "papers filed with and proceedings before the Commission." The article did not discuss the substance of the Commission hearing and did not state what determination, if any, had been made by the Commission. The Supreme Court of Virginia, however, concluded that the statute prohibited disclosure of "all information concerning a proceeding before the Commission." J.S. Appendix at p. 4a; 217 Va. at 702. *Amici* submit that this broad interpretation of the statutory terms raises notice problems as well, and necessitates a finding that the statute is void on vagueness grounds.

[55] In *Connally* v. *General Construction Co.* the Court declared: "But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words

Amendment rights are involved, even stricter standards of permissible statutory vagueness must be applied; "a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Hynes* v. *Borough of Oradell*, 425 U.S. at 620, quoting from *Smith* v. *California*, 361 U.S. 147, 151 (1959). See also *Buckley* v. *Valeo*, 424 U.S. 1, 40-41 (1976); *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974); *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287-88 (1961).

In the instant case, Landmark was forced to guess at the meaning of the word "divulge," unaided by the Virginia General Assembly. The word is nowhere defined in the statute; the legislative history contains no reference to its meaning; and there was no judicial precedent available to Landmark in attempting to construe the term "divulge" in Virginia Code § 2.1-37.13.

Nor could Landmark resort to common usage to determine the meaning of "divulge." While the Supreme Court of Virginia relied upon *Black's Law Dictionary* (4th ed., 1951) to support its interpretation of the word "divulge," other authorities suggest that the act of "divulging" encompasses only the first act of dis-

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or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, . . . or a well-settled common law meaning, notwithstanding an element of the degree in the definition as to which estimates might differ, . . . or, as broadly stated by Mr. Chief Justice White in *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 92, 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.'" 269 U.S. at 391-92.

closure and not subsequent publication by the press."[56] Indeed, when the Virginia General Assembly has sought to prohibit the press from publishing other types of information, it has enacted legislation specifically addressed to the press."[57]

The Attorney General has argued that to interpret the word "divulge" any more narrowly than the Supreme Court of Virginia did would thwart the purposes of the act and "emasculate the Commission." Motion to Affirm at p. 14. As an initial matter, *amici* note that the Commonwealth has utterly failed to demonstrate that enforcement of a more narrowly construed statute—aimed at participants in Commission proceedings—would be inadequate to serve the Commonwealth's purposes. Indeed, its insistence on the need for a broad interpretation of the statute is completely undermined, *amici* submit, by the fact that similar statutes in thirty-three other jurisdictions contain no penal provisions whatsoever for the publica-

[56] At trial, counsel for Landmark relied upon *Webster's Third International Dictionary* (1961), which includes the following definition of "divulge": "to tell or make known (a secret or confidence or what had been previously unknown)." There is no suggestion that Landmark breached any confidence by publishing the article at issue in this case.

[57] Virginia Code § 53-322 provides that "[n]o newspaper or person shall print or publish the details of the execution of criminals . . . ." *Amici* rely on this statute solely to demonstrate that the Virginia General Assembly has made explicit reference to the press when it intends to prohibit publication of certain information; *amici* do not concede the statute's constitutionality.

The United States Congress has also recognized that the word "divulge" does not encompass press publication: it drafted the Communications Act of 1934, 47 U.S.C. § 605, to prohibit any person from either "divulg[ing] or publish[ing]" intercepted communications.

tion of reports concerning judicial inquiry commissions."[58] Even assuming, however, that the Commonwealth's broad interpretation of the word "divulge" would best serve the legislature's purposes, that affords no basis for rejecting Landmark's vagueness claim. It was not Landmark's obligation to sit as a court and construe the Commonwealth's penal provision in a manner that best serves the Commonwealth's purposes. It was the General Assembly's duty to embody its purposes in language sufficiently clear to give adequate notice of the statute's prohibition. And that it failed to do.

B. Overbreadth

Virginia Code § 2.1-37.13 is susceptible to such sweeping and improper application that, irrespective of its defects as applied in this case, it is void for overbreadth. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *United States* v. *Robel*, 389 U.S. 258 (1967); *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940). By erecting a wall of silence regardless of the importance of the speech and regardless of whether any interest in confidentiality is thereby served, the statute runs afoul of the well-established principle that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of

[58] The Supreme Court of Virginia referred to thirty-four other states with statutes requiring confidentiality with respect to judicial inquiry commissions. J. S. Appendix at p. 6a; 217 Va. at 703. Of these, only the Hawaiian statute contains penal provisions prohibiting disclosure of commission proceedings.

protected freedoms." *NAACP* v. *Alabama ex rel. Flowers,* 377 U.S. 288, 307 (1964).

The boundless applications of the statute at issue are hardly an abstract, sterile proposition.[59] On its face and as construed by the Supreme Court of Virginia, this statute prohibits speech at the very core of First Amendment protection. And it does so without exception for compelling necessity or particularized need. The press is prohibited from publishing reports of Commission proceedings even if the reports are written to inform the public that the Commission had shirked its responsibilities or had been corrupted by political forces.[60]

The statute's restraint on speech is not confined to the press. It reaches broadly to each person in a chain of speakers conveying information of public importance to his neighbor, transforming each into a criminal "divulger."[61] On its face the statute even extends to potential witnesses who have been subpoenaed to give testimony, prohibiting them from consulting with counsel regarding their testimony.[62]

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[59] *Amici* have already noted some of the examples of the statute's broad scope. *See* pp. 29-32, *supra.*

[60] The history of regulatory commissions demonstrates that constant scrutiny and robust, unbridled public criticism are essential if government by commission is to flourish. See generally, Stewart, *The Reformation of American Administrative Law,* 88 Harv. L. Rev. 1667 (1975).

[61] Nor are these potential applications of Virginia Code § 2.1-37.13 "whimsical and farcical straw [men]." *Baggett* v. *Bullitt,* 377 U.S. 360, 383 (1964) (Clark, J., dissenting).

[62] Virginia Code §§ 2.1-37.11 through 2.1-37.13. The extended discussion surrounding the drafting of Rule 6(e) of the Federal Rules of Criminal Procedure, the provision on grand jury secrecy, demonstrates beyond peradventure that concern over the right of a Commission witness to consult with counsel is not an "irrational imagining." As evidenced by the notes to that rule, solicitude for just such a hypothetical witness persuaded the draftsmen to exempt witnesses from the grand jury's oath of silence. See Federal Rules of Criminal Procedure, Second Preliminary Draft, Note to Rule 6; *In re Russo,* 53 F.R.D. 564, 570-71 (1971).

The statute's prohibition is so unbounded in time and scope as to approach the absurd. The citizen who today announces his intent to file a complaint against a judge is prohibited from announcing tomorrow that he has carried out his intent. And the judge who is publicly charged with misconduct is prohibited from announcing that a Commission investigation has cleared him of the charges.

Even assuming that the Commonwealth's interests would justify some restraint upon speech, it is clear, *amici* submit, that those interests cannot support the broad prohibition on speech contained in Virginia Code § 2.1-37.13. "[T]he separation of legitimate from illegitimate speech calls for more sensitive tools" than the Virginia General Assembly has supplied. *Speiser* v. *Randall,* 357 U.S. 513, 525 (1958).[63] For this reason, Virginia Code § 2.1-37.13 must fail on overbreadth grounds.

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[63] As articulated by Chief Justice Warren in *United States* v *Robel,* 389 U.S. 258, 268 (1967):

> "[W]hen legitimate concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, [the legislature] must achieve its goal by means which have a less drastic impact on the continued vitality of First Amendment freedoms. The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less." (Citations omitted).

CONCLUSION

In the search for political, social, and economic truth, and in the legitimate governance of our democratic Republic, our constitutional faith is placed in enlightened decisionmaking by the citizenry—the ultimate sovereigns. The threats to that ideal are myriad: ignorance, apathy, suppression of novel or unpopular views, and corruption or abuse of government power. But striving to attain the ideal is itself integral to our constitutional faith, and each small triumph over threats to that ideal is a reaffirmation of our democratic strength.

The core precept of the First Amendment guarantee of "freedom of the press" is that the free and independent press occupies a protected institutional role in combatting the lurking evils that constantly threaten enlightened self-government. The press can only fulfill the lofty aspirations of that precious role through the unfettered and robust dissemination of information and ideas about government affairs. When the press pierces the veil of government secrecy or deceit to expose incompetence or corruption, the constitutional faith is that the citizenry can and will take appropriate action to bring their public servants to task. When the press reveals covert government action or illegitimate aggrandizement of official power that infringes the liberties of the people, the constitutional faith is that the citizenry can and will take prompt remedial action. When the press disseminates information about the conduct of government affairs, the constitutional faith is that public debate about that information will lead to public validation where appropriate, public repudiation or reform where necessary. To trammel the free-

dom of the press in this mission is to enslave the public. For without accurate information about government affairs to guide their decisions, the public must dwell under the tyranny of ignorance; without all information by which to evaluate public policy in the search for truth, the public must suffer under unwise and unjust policies.

Virginia Code § 2.1-37.13 imposes criminal sanctions on the press for the publication of accurate reports about governmental affairs. To call such speech a punishable "abuse" of First Amendment freedoms is to eviscerate the majestic command of that Amendment. Acceptance of any official power to criminalize such speech is to allow the government to force the press to become an unwilling partner in a conspiracy of silence that would stifle truth and relegate the public to an uninformed and dispirited condition. It is an insidious doctrine that should find no aid or comfort from this Court.

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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Certificate of Service

I hereby certify that three printed copies of the foregoing Brief for The Washington Post Company, *et al., Amici Curiae,* were mailed, first class mail, postage prepaid, this 28th day of July, 1977 to each of the following:

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APPENDIX

APPENDIX

CAHILL GORDON & REINDEL
EIGHTY PINE STREET
NEW YORK, N.Y. 10005

June 28, 1977

Re: Landmark Communications, Inc. v.
Commonwealth of Virginia, 76-1450

Dear Mr. Kuhns:

On behalf of Landmark Communications, Inc. I hereby consent to the filing of a brief *amicus curiae* in the above entitled matter.

Very truly yours,

/s/ FLOYD ABRAMS
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June 23, 1977

James E. Kulp, Esquire
Assistant Attorney General
Commonwealth of Virginia
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

Dear Mr. Kulp:

Pursuant to our telephone conversation, I am writing to ask your consent to our filing an *amicus* brief on behalf of a group of news media, including The Washington Post Company, in the United States Supreme Court, in *Landmark Communications* v. *Commonwealth of Virginia*, No. 76-1450. I would further request your consent to have the *amicus* brief filed no later than July 28, 1977, which is forty-five days after the Court noted probable jurisdiction on June 13, 1977.

If you do consent as requested in this letter, please indicate by signing below.

Sincerely,

/s/ JOHN B. KUHNS
John B. Kuhns

JBK:nao

June 28, 1977

On behalf of the Commonwealth of Virginia, I consent to the above.

/s/ JAMES E. KULP
James E. Kulp
Assistant Attorney General

MOTION FILED

AUG 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,

Appellant,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

MOTION OF THE AMERICAN CIVIL LIBERTIES UNDN AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOR LEAVE TO FILE BRIEF *AIICI CURIAE*, AND BRIEF *AMICI CURIAE*

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1976
No. 76-1450

LANDMARK COMMUNICATIONS, INC.
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

On Appeal From The
Supreme Court of Virginia

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Civil Liberties Union and the American Civil Liberties Union of Virginia respectfully move, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amici curiae. Counsel for the Appellant has consented to the filing of this brief. */ Counsel for the appellee indicated, in a telephone conversation, that the appellee would consent only on the condition that this brief be

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*/ A copy of that letter is being filed with the Clerk.

filed no later than the due date of July 28, 1977. Because of the press of other litigation responsibilities with respect to cases in this Court and other courts, this brief could not be prepared, produced and filed by July 28. It is, however, being sent to our printer on that date, and it should be filed with the Court no later than August 1, 1977, if not sooner. But since the appellee's consent was conditional on this brief's being filed by July 28, this motion is required by the Rules.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members. The ACLU is dedicated solely to defending the safeguards of the Bill of Rights. Central among those protections is the First Amendment's guarantee of a free press, a condition prerequisite to the continued maintenance of a free society. The ACLU has participated in countless cases involving the First Amendment, in this and other courts.

The American Civil Liberties Union of Virginia, the statewide affiliate of the national ACLU, has a particular interest in the resolution of the issues here. It provided counsel to the plaintiffs in Nationwide Communications, Inc. v. Backus, C.A. No. 77-0139-R (E.D. Va.), a federal district court action challenging the constitutionality of Virginia Code Section 2.1-37.13, the statute at issue here. Although prelim-

inary relief was granted, the action was dismissed by agreement due to the pendency of this appeal. See, Jurisdictional Statement, p. 10.

The issues in this case, involving truthful reporting about the official conduct of public officers, are of vital importance to the continued maintenance of a free press as a crucial prerequisite to a free people. We would hope that our analysis of those issues will be of assistance to the Court in resolving the questions before it. And it is in order to present that analysis that amici respectfully move for leave to file this brief.

Respectfully submitted,

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

On Appeal From The
Supreme Court of Virginia

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, AMICI CURIAE

INTEREST OF AMICI */

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members. The ACLU is

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*/ Counsel for the Appellant has consented to the filing of this brief, and that letter is being lodged with the Clerk. Counsel for the appellee indicated, in a telephone conversation, that the appellee would consent only on the condition that this brief be filed no later than the due date of July 28, 1977.

dedicated solely to defending the safeguards of the Bill of Rights. Central among those protections is the First Amendment's guarantee of a free press, a condition prerequisite to the continued maintenance of a free society. The ACLU has participated in countless cases involving the First Amendment, in this and other courts.

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STATEMENT OF THE CASE

On October 4, 1975, appellant Landmark Communications, Inc. ran a story in its newspaper, The Virginian-Pilot, relating the uncontested fact that a local juvenile judge was being investigated by the Judicial Inquiry and Review Commission upon allegations of judicial misconduct. The Commission is the state agency charged with investigating charges of misconduct

leveled against Virginia's judiciary. The story identified the judge by name, stated that no formal charges had been filed against him, and further stated that this indicated either that the Commission's investigation was still continuing or that it had found insufficient cause to proceed further.

Landmark was subsequently indicted for publishing the name of the judge in violation of Virginia Code Section 2.1-37.13. This statute provides that "(a)ll papers filed with and proceedings before the Commission...including the identification of the subject judge as well as all testimony and other evidence...shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the [Virginia] Supreme Court shall lose its confidential character..." Violation of this proscription is a misdemeanor, carrying a maximum punishment of a year in jail and a fine of $1,000.

At trial, no evidence was presented by the prosecution other than a stipulation in which Landmark admitted that it published The Virginian-Pilot, that it ran a story identifying a judge under Commission investigation, and that at that time the Commission had not filed a formal complaint in the Virginia Supreme Court. An editor of the paper testified that he ran the story because he felt that it was of important news value and he did not

believe Section 2.1-37.13 applied to newspaper publication. On January 15, 1976, Landmark was found guilty as charged and fined $500 plus the costs of prosecution.

The conviction was appealed to the Supreme Court of Virginia, which affirmed. That court first refused to narrow the scope of Section 2.1-37.13, so as to provide criminal penalties only for the release of Commission information by those directly involved in an investigation. Instead, the court held that release of any such information by any person, including newspapers, violates the section. The court also rejected Landmark's contention that the statute was unconstitutional as a violation of the First Amendment guarantee of a free press. Purporting to apply a clear and present danger test, the court found that the section's proscription is "indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings...." (J.S. App.18a). The court, however, admitted that there was no specific evidence in the record to support that conclusion.

ARGUMENT

SECTION 2.1-37.13, ON ITS FACE AND AS APPLIED HERE, VIOLATES THE FREE PRESS GUARANTEE OF THE FIRST AMENDMENT.

Introduction

The central issue in this case is both important and straightforward: may the press be subject to criminal sanctions for the publication of truthful statements concerning a public official in connection with the performance of his public duties. Resolution of the question implicates the core values of our democratic system of government and the function of the free press as a mainstay of that system.

It is equally important, however, to note what is not involved in this case. We do not deal here with the imposition of sanctions for intentionally or recklessly false statements about public officials. Cf. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Nor, conversely, do we deal with the disclosure of true but personal or embarrassing facts about private individuals. Cf. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). Similarly, the case for suppression of publication does not rest on any countervailing concern for the protection of other constitutional rights, such as the right of a criminal defendant to a fair

trial. Cf. Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976). Finally, the case does not even directly involve the protection of witnesses or complainants before an investigating agency.

Rather, in the context of this case, involving the reporting of truthful information about public officials and the discharge of their public responsibilities, the First Amendment operates in its most compelling and insistent fashion. The publication of such information can clearly not be restrained in advance. See New York Times Co. v. United States, 403 U.S. 713 (1971). But here, Virginia seeks to accomplish through subsequent criminal punishment what it could not achieve through prior restraint. For the following reasons, the First Amendment will not permit such a result.

A. The punishment sustained below constitutes an unprecedented form of interference with the proper functioning of a free press.

The constitutional protection given our nation's press is, of course, one of the most cherished values in the Bill of Rights. As stated by Mr. Justice Sutherland over forty years ago:

> ...since informed public opinion is the most important of all restraints upon misgovernment, the suppression or abridgement of

> the publicity afforded by a free press cannot be regarded otherwise than with grave concern.... A free press stands as one of the great interpreters between government and the people. To allow it to be fettered is to fetter ourselves. Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

Since the Holmes-Brandeis dissent in Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921), this Court has accorded newspapers special protection under the First Amendment, in recognition of the fact that the nation's political and judicial institutions will be free only insofar as its press is free of governmental censorship. The Court has consistently resisted attempts by federal and state government to invade or diminish the right of newspapers freely to choose the material they will print. Whether the attempts have taken the form of prior restraints, Near v. Minnesota, 283 U.S. 697 (1931); New York Times Co. v. United States, 403 U.S. 713 (1971); Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976), subsequent punishments, Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947); Mills v. Alabama, 384 U.S. 214 (1966); Bigelow v. Virginia, 421 U.S. 809 (1975); discriminatory taxes, Grosjean v. American Press Co., supra, inhibiting forms of libel actions, New York Times Co. v. Sullivan, 376 U.S.

254 (1964), or forced replies from irrate readers, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court has consistently recognized that a central purpose of the First Amendment is to insure and encourage a free press as a fundamental instrument of political liberty. As stated by Mr. Justice Black for the Court in Mills v. Alabama, supra at 219:

> Suppression of the right of the press to praise or criticise governmental agents and to clamor and contend for or against change ...muzzles...the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

In fact, no case since Burleson, has upheld the power of federal or state government to forbid the exercise of free editorial choice with respect to truthful reporting or punished the press for exercising that choice. 1/ That historical

1/ Pittsburg Press Co. v. Pittsburg Commission on Human Rights, 413 U.S. 376 (1973), did uphold the power of government to prohibit discrimatory classified advertisements. However, this decision rested upon the fact that commercial advertisements were involved which did not express a position on a "matter

(footnote continued next page)

fact is a special feature of our political system and its theme was re-emphasized by Mr. Chief Justice Burger in Tornillo:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials--whether fair or unfair--constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.
> 418 U.S. at 258.

Amici contend that newspapers simply cannot be criminally punished under any circumstances for exercising editorial choice to publish news, including truthful information concerning the name of a judge against whom charges of official miscon-

of social policy" and which did not involve any editorial "judgmental discretion" in the content and placement of the want ads. The opinion reaffirmed "the protection afforded to editorial judgment and to the free expression of views on these and other issues however controversial." 413 U.S. at 931.

duct have been made and who is being investigated by government officials. In Mills v. Alabama, supra, the Court held that "no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper to do no more than urge people to vote one way or another in a publicly held election." 384 U.S. at 220. The same principle is applicable here, and the Court need go no further to resolve the issues in this case and reverse the judgment below.

B. The State's interests are inadequate to justify the total censorship imposed by Section 2.1-37.13.

Even assuming arguendo that further inquiry is required, and whether measured by the classic clear and present danger test or the more recent "imminent lawless action" test of Brandenburg v. Ohio, 395 U.S. 444 (1969), the state can show no interest sufficient to justify punishment of the press for communicating the kind of information involved here. The Court has refused to permit speech censorship based on content except in the most limited circumstances. Only where there is obscenity, Miller v. California, 413 U.S. 15 (1973), advocacy of imminent lawless action likely to incite violence, Brandenburg v. Ohio, supra, "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942), defam-

tory speech uttered with "actual malice," Gertz v. Robert Welsh, Inc., 418 U.S. 323, 340 (1976), or advertisements proposing illegal activities, cf., Pittsburg Press Co. v. Pittsburg Commission on Human Relations, 413 U.S. 376 (1973), has the Court sustained content restrictions on speech. Rather, the Court has prohibited press censorship in a wide variety of circumstances, even when government sought to protect substantial state interests, ranging from national security, New York Times Co. v. United States, supra, to a defendant's right to a fair trial, Nebraska Press Assn. v. Stuart, supra.

Measured against this background of deference to First Amendment values, the state's interest in shielding investigations of the Judicial Inquiry and Review Commission from public disclosure is woefully inadequate. The Virginia Supreme Court listed the state's interest here as threefold:

> (T)he requirement of confidentiality in Commission proceedings (1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and wit-

> nesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious. (J.S. App. 18a).

The first two rationales do not, in any way, aid the Commission itself in its mission of policing the State's judiciary. They speak only to protecting individual judges and the judiciary generally from public disfavor allegedly bred by frivolous complaints. Even if the underlying state interest in maintaining respect for the judiciary is legitimate, the means chosen to effectuate that interest unnecesarily and impermissably infringe First Amendment guarantees.

The state cannot seek to legislate respect for any governmental agency. West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943); Wooley v. Maynard, ___ U.S. ___, 97 S.Ct. 1428 (1977). It can develop and maintain institutions of government which warrant respect, but it cannot, by censorship or regulation of the press, attempt to manipulate or coerce such respect.

On the contrary, the very purpose of the First Amendment is to encourage the widest possible range of debate on public issues and public officials:

> Whatever differences may exist about interpretations of the

> First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes... Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Mills v. Alabama, supra at 218-219.

This protection extends to information which is unfair, caustic and even "untrue":

> (D)ebate on public issues should be uninhibited, robust, and wide-open, and...it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials... Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth, whether administered by judges, juries or admin-

istrative officials... New York Times Co. v. Sullivan, supra at 270.

Allowing an unrestrained flow of information is of particular importance when dealing with the judiciary and judicial agencies. Only courts can dispense criminal penalties, an awesome power that is potentially subject to serious abuse. See, Powell v. Alabama, 287 U.S. 45 (1932). Even in civil cases, courts can by a single decision affect both private and public interest to an extent often unmatched by other branches of government. See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954). The fact that the judiciary, unlike the other two branches of government, frequently is not directly responsible to the electorate justifies increased scrutiny of judicial affairs to insure that judicial power is exercised consistent with law. It is the duty of the press to publish information necessary for public scrutiny of judicial conduct. It is in recognition of this duty that "(t)ruthful reports of public judicial proceedings have been afforded special protection against subsequent punishment." Nebraska Press Assn. v. Stuart, supra at 559.

This principle was emphasized in a highly analogous context in Cox Broadcasting Corp. v. Cohn, supra, in which the reporting of the name of a rape victim, found in court records, was held protected

by the First Amendment notwithstanding a Georgia statute prohibiting such publication. In Cox the court recognized the critical role of the media in commenting on court proceedings, noting that most citizens view court proceedings through the press rather than personally. 420 U.S. at 491-92. Accordingly, the Court held that "States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection." Id. at 495.

The rationale of the Cox case cannot be limited to the right to report information gleaned from public court proceedings and official records and documents open to the public. While such sources are "the basic data of governmental operations," 420 U.S. at 492, they are not the only data. Protection for the vital press functions which this Court identified in Cox cannot be made to vary depending on the source of the information reported. In either case, the press role remains the same:

> With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. See Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). Cox Broadcasting Corp. v. Cohn, supra, 420 U.S. at 492.

This special function extends well beyond mere reporting and includes the expression of opinions and criticism:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

Even in the context of ongoing criminal trials, where defendants are subject to a barrage of publicity which could abridge their constitutional right to a fair trial, this Court has refused to allow censorship of the press. Nebraska Press Assn. v. Stuart, supra. The state's interest in maintaining the reputation of the state's judges is insignificant in comparison to a defendant's constitutional right to a fair trial. It follows, as this Court ruled in Bridges v. California, 314 U.S. 252 (1941), that the state's interest in maintaining respect for the judiciary or shielding the reputation of

its members is not sufficiently weighty to shield the judiciary from public scrutiny or even criticism:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect. Id. at 270-71.

The third rationale advanced by the Virginia Supreme Court, that censorship is necessary to protect complainants and witnesses from recrimination, is related to the actual workings of the Commission, but that interest is, in this case, both irrelevant and insufficient. The conviction at issue here had nothing to do with that purported interest. Appellant was convicted for releasing the name of the judge being investigated. Appellant did not print the name of the complainant and witnesses before the Commission. (J.S. App. 21a). Accordingly, that interest is irrelevant to this case. Moreover, as we will now show, that interest is insufficient to justify a total ban on press reporting, but this Court need not resolve this issue

in order to reverse the judgment below.

Although attempting to preserve the anonymity of witnesses and complainants may aid the Commission's procedural machinery, the Commission has not demonstrated, as required by the First Amendment, that such anonymity is essential. Nor could it. Section 2.1-37.13 itself forces witnesses and complainants into public view when the Commission files formal charges. Complainants and witnesses know that if the Commission believes their allegations have merit, their names and allegations will be made public. Accordingly, complaintants and witnesses have no expectation of anonymity, and the Commission cannot show that anonymity is essential. Similarly, if proceedings upon a formal complaint can withstand the rigors of public scrutiny, there is no reason why earlier proceedings cannot.

The anomalous effect of Section 2.1-37.13 is to give greater protection to frivolous complaints, and to the witnesses and complainants who bring them, than to those which the Commission finds meritorious. A complainant who makes malicious charges without any factual support will be completely protected from recrimination because his complaint will never be formally filed or released. Honest complainants, who bring real misconduct to the Commission's attention, resulting in the filing of public charges, are the only ones who are potentially subject to the

wrath of vindicative judges. 2/

There is no public interest in protecting the anonymity of frivolous complainants, while disclosing the names of bona fide complainants.

Finally, whatever value there may be, this third interest does not require or justify the blanket censorship imposed by Section 2.1-37.13. The First Amendment requires not only that speech restrictions be supported by compelling interests; it requires also that the state confine restrictions upon speech as narrowly as possible, using the least restrictive means of regulation possible. Shelton v. Tucker, 364 U.S. 479, 488-490 (1960). The statute at issue here flagrantly violates this principle. It censors all information on Commission proceedings, not just the names and identifying data of complainants and witnesses. Such a broad sweep is unnecessary to protect the confidentiality of these individuals.

2/ Furthermore, to the extent that the "recrimination" feared by the Virginia Supreme Court will be recrimination by the judge under investigation, that judge will no doubt know the names of those who have filed complaints, whether or not those names are published. Thus, public anonymity will not preclude private recrimination.

c. Section 2.1-37.13 is unconstitutionally overbroad.

The overbreadth of this statute is readily apparent. As interpreted by the Virginia Supreme Court, it authorizes criminal penalties for revealing the name of any judge investigated by the Commission, and any evidence adduced in the course of an investigation, unless the Commission elects to file public charges against the judge. As such, it prohibits the public release of relevant information in the course of legislative or executive deliberations concerning the election or appointment of judges[3] or Commission members. It potentially censors news accounts of bribes received by Commission members which prevent investigations of corrupt judges. It prevents dissatisfied complainants from publicly criticizing the Commission or the judge involved in all but the most general terms. It simply "sweeps within its prohibitions what may

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3/ For provisions on the method of selection for Virginia judges, see Constitution of Virginia, Art. VI, Section 7, Virginia Code Sections 17-120 - 17-122 and 16.1-69.9. Although there are differences between courts of record and those not of record, the Virginia system, in essence, provides for election by the state legislature.

not be punished under the First and Fourteenth Amendments." Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). Thus the statute suffers from the fatal constitutional defect of overbreadth.

This Court has required that provisions impinging upon areas protected by the First Amendment must be drawn with sufficient narrowness and precision to insure that First Amendment freedoms retain the "breathing space" necessary for robust survival. E.g., Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970); Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67 (1960); Broadrick v. Oklahoma, 413 U.S. 601 (1973). As was true of the statute in Spence v. Washington, 418 U.S. 405, 414, n. 9 (1974), Section 2.1-37.13 is of "limitless sweep" and is therefore unconstitutionally overbroad. See also, Gooding v. Wilson, 405 U.S. 518 (1972); Keyshian v. Board of Regents, 385 U.S. 589 (1967); Cox v. Louisiana, 379 U.S. 536 (1965).

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed and Section 2.1-37.13 declared unconstitutional.

Respectfully submitted,

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